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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANTS,

vs.

R. O. JENKINS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED AUGUST 21, 1935.

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[fol. 1]

IN SUPREME COURT OF ARKANSAS

PHILLIPS PETROLEUM COMPANY, a Corporation, and UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Appellants,

vs.

R. O. JENKINS, Appellee

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 26, 1935

To the Honorable W. P. Sadler, Clerk of the Supreme Court of the State of Arkansas:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following:

1. Original petition for appeal from the Supreme Court of the State of Arkansas to the Supreme Court of the United States.
2. Original assignment of errors and prayer for reversal.
3. Original order allowing appeal.
4. A copy of the supersedeas bond and its approval.
5. Original citation with proof of service.
6. Original statement of basis of jurisdiction of the United States Supreme Court to review judgment of the Supreme Court of Arkansas upon appeal.
7. Original notice or statement pursuant to Paragraph 2 of Rule 12 of the Supreme Court of the United States, with proof of service.
8. A copy of the opinion of the Supreme Court of Arkansas.
9. A copy of the order of the Supreme Court of Arkansas overruling appellant's petition for rehearing.
10. A copy of the final judgment of the Supreme Court of Arkansas dated May 6, 1935.
11. A copy of the final judgment of the Circuit Court of Ouachita County, Arkansas (Transcript, page 28).
12. A copy of the complaint (Transcript, pages 1 to 5).

[fol. 2] 13. A copy of the answer of Phillips Petroleum Company (Transcript, pages 20 to 23).

14. A copy of the testimony of the following witnesses:

R. O. Jenkins (Transcript, pages 40 to 79, and 130 to 135).

Joe H. Myers (Transcript, pages 136 to 152).
Jim Forsythe (Transcript pages 155 to 171).
Will McGuire (Transcript, pages 172 to 177).
Thomas H. Norris, Jr. (Transcript, pages 177 to 182).
C. M. Oden (Transcript, pages 183 to 185).

15. Defendant's motion for instructed verdict, with the ruling of the court thereon (Transcript page 274).

16. Instructions by the court, with the exceptions thereto (Transcript, pages 275 to 285).

17. Verdict of the jury (Transcript, page 287).

18. Motion for new trial, with order of the court thereon (Transcript, pages 288 to 295).

18A. Copy of the supersedeas bond executed by U. S. F. & G. Co.

19. Statement showing the filing of the bond and the lodgment of copies of the allowance of appeal in your office.

20. A return of such allowance of appeal and the statement of costs.

21. A copy of this præcipe.

Please certify the same to the Supreme Court of the United States under your seal and in accordance with the rules of said court and the laws of the United States upon such appeal.

Dated this 21st day of June, 1935.

Marsh & Marsh, Mahony & Yocum, R. H. Hudson, R. L. Foster, Counsel for Appellant.

[File endorsement omitted.]

[fol. 3] IN SUPREME COURT OF ARKANSAS

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 3, 1935

To the Honorable W. P. Sadler, Clerk of the Supreme Court of the State of Arkansas:

Supplementing the præcipe heretofore filed herein, designating the portions of the record to be included in the transcript of the record to be filed in the Supreme Court of the

United States, you will please include in said transcript of the record the following:

1. A copy of all portions of the bill of exceptions not included in the original præcipe to the end that the transcript shall contain the entire bill of exceptions.

2. A copy of this supplemental præcipe, with proof of service.

Dated this 29th day of June, 1935.

Marsh & Marsh, Mahony & Yocum, R. H. Hudson, R. L. Foster, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 4] Service of the foregoing supplemental præcipe is acknowledged this 1st day of July, 1935.

L. B. Smead, Robert C. Knox, J. V. Spencer, Counsel for Appellee.

[fol. 5] IN CIRCUIT COURT OF OUACHITA COUNTY, SECOND DIVISION

R. O. JENKINS, Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY and JOE H. MYERS, Defendants

COMPLAINT—Filed June 16, 1934

Comes the plaintiff, R. O. Jenkins, and for his cause of action against the defendants, Phillips Petroleum Company and Joe H. Myers, states:

1. That the defendant, Phillips Petroleum Company, is a foreign corporation, authorized to do business in the State of Arkansas, and is engaged in the business of operating oil and gas wells, producing oil and gas and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas, and in the Counties of Ouachita and Union, and at all times mentioned herein was engaged in such business;

2. That the plaintiff, R. O. Jenkins, is a citizen and resident of the State of Arkansas;

3. That the defendant, Joe H. Myers, is a resident of Union County, Arkansas;

4. That on April 5, 1934, and for sometime prior thereto, the plaintiff was in the employ of the defendant, Phillips Petroleum Company, in connection with the operation of its oil and gas wells and pipe lines in the State of Arkansas, and the Counties of Ouachita and Union, in the capacity of laborer; that defendant, Joe H. Myers, was at all times mentioned herein an employee of defendant, Phillips Petroleum Company, and a fellow servant of plaintiff;

5. That in the forenoon of April 5, 1934, the plaintiff, [fol. 6] together with other employees of the defendant, Phillips Petroleum Company, were engaged under the direction of their foreman, Jim Forsythe, in stringing a 2½" gas line for the defendant, Phillips Petroleum Company, at its Fleming lease in Union County, Arkansas; that while engaged in such work, and at about 10:30 o'clock in the forenoon, the plaintiff and defendant, Joe H. Myers, while in the performance of their duties for the said Phillips Petroleum Company, and under instructions from said foreman, were engaged in carrying a joint of pipe 2½" in diameter, 31 feet long and weighing about 250 pounds to the place where other employees were stringing said pipe line; that the plaintiff was carrying one end of said pipe line; that the plaintiff was carrying one end of said pipe on his shoulder and that the defendant, Joe H. Myers, was carrying the other end of said pipe on his shoulder, the plaintiff being at the front end of said pipe with his back to said Joe H. Myers and the said Joe H. Myers were proceeding with said joint of pipe the plaintiff came to a place in the ground where the roots of a sweet gum tree had rotted out and left a hole about eighteen inches wide, five feet long and twelve inches deep; that as plaintiff neared said hole in proceeding with said joint of pipe the said Joe H. Myers carelessly and negligently, and without warning to plaintiff, shifted the end of the said joint of pipe he was carrying from one shoulder to the other, and at the same time the said Joe H. Myers carelessly and negligently jerked on said joint of pipe causing the plaintiff to lose his balance and to step in said hole and fall; that plain-

tiff fell violently to the ground striking in a twisted position and causing the joint of pipe to fall and strike the plaintiff on his back in the region of his first and second lumbar vertebra.

6. That by reason of said fall so received by the plaintiff, as a result of the carelessness and negligence of the de- [fol. 7] fendant, Joe H. Myers, the plaintiff suffered the following injuries, to-wit:

(a) The first and second lumbar vertebræ were separated with attendant severe impact and concussion of the spinal cord in the region of the first and second lumbar vertebræ and the ligaments in the region of the spinal cord near the first and second lumbar vertebræ were bruised and torn with attendant adhesions bleeding and swelling; all of which caused pressure upon the spinal cord and resulted in Myelitic softening of the lower end of the spinal cord, causing injury and degeneration of the nerves of the spinal cord and the nerves running therefrom, with resulting motor and sensory paresis, loss of sensation of the lower extremities and loss of free locomotion of the legs, back and hips of the plaintiff and causing partial paralysis of the hips, legs and back of the plaintiff of the progressive type which will gradually grow worse until complete paralysis will exist;

(b) A severe injury to the Sacro-Iliac joints with contusions of the Sacro Iliac surfaces, resulting in a traumatic Sacro Iliac arthritis;

(c) A severe injury to the Pelvic bone; his Pelvis is tilted and the Muscles and ligaments of the region thereof are strained, torn and bruised;

(d) A curvature of the spine;

(e) A total loss of this sexual functions and powers;

(f) The bladder and rectal centers of the plaintiff are involved; the control of the plaintiff over the action of his bowels and the passing of his urine are impaired; this condition will progress until plaintiff will completely lose control of the action of his bowels and of the passing of urine and will lose complete control of the impulse to urinate or [fol. 8] to stool;

(g) That on account of his said injuries the health of the plaintiff has become greatly impaired, and his nervous system has been damaged and impaired; that all of his injuries are permanent and progressive and will continually grow worse; that on account of his said injuries the plaintiff suffered severe physical pain and mental anguish, and will continue to suffer for the balance of his lifetime;

7. That at the time of his injuries the plaintiff was 27 years of age and was in sound health and condition both physically and mentally; that at such time he was earning 48¢ an hour, working eight hours a day, and had reasonable expectancy for promotion so that his earning capacity would be greatly increased; that on account of such injuries the earning power and capacity of the plaintiff has been wholly destroyed; that the plaintiff is not, and was not, equipped to earn his living except by manual labor; that since his said injury and on account thereof plaintiff has been unable to perform manual labor or any kind of work whatsoever, and will be unable to perform any manual labor or work for the balance of his life time; that at the time of his said injuries the plaintiff was in the exercise of ordinary care for his own safety;

8. That the injuries to the plaintiff were caused solely on account of the negligence and carelessness of the defendant, Joe H. Myers, in the following particulars, to-wit:

The said Joe H. Myers while carrying one end of said pipe on his shoulder, as aforesaid, carelessly and negligently, and without warning to the plaintiff, shifted the end of the joint of pipe he was carrying from one shoulder to the other, and at the same time carelessly and negligently jerked on said joint of pipe causing the plaintiff to lose his balance and to step in said hole and fall as aforesaid;

[fol. 9] 9. That the injuries to the plaintiff were caused solely on account of the overt acts of the said Joe H. Myers as above set out, and at the time such acts were committed by the said Joe H. Myers he was a fellow servant of the plaintiff, both being in the employ of the defendant, Phillips Petroleum Company;

10. That by reason of his injuries, as aforesaid, the pain and suffering which he has encured and which he will en-

dure in the future and his loss of earning power and capacity, plaintiff has been damaged in the sum of $75,000.00.

Wherefore, premises considered, plaintiff prays judgment against the defendants, Phillips Petroleum Company and Joe H. Myers, and each of them, in the sum of $75,000.00, for his costs herein expended and for all other and proper relief to which he may be entitled.

L. B. Smead, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 10] In Circuit Court of Ouachita County

[Title omitted]

Separate Answer of Phillips Petroleum Company—
Filed Aug. 24, 1934

* * * * * * *

Comes now the defendant, Phillips Petroleum Company, and for its answer to the complaint of the plaintiff filed herein says:

It admits that it is a corporation authorized to do business in Arkansas, that it is incorporated under the laws of the State of Delaware and is engaged in the production and transportation of oil in Union and Ouachita Counties, Arkansas.

It admits that on April 5, 1934 the plaintiff was in its employ and that in said date he, together with other employees of this defendant, were engaged, under direction of their foreman in stringing 2½" — at defendants Fleming Lease in Union County, Arkansas. It admits that Plaintiff and Joe H. Myers, one of defendants employees, were on that date engaged in carrying a joint of 2½ pipe to the place where other employees of this defendant were engaged in connecting and laying such pipe.

It denies that said joint of pipe complained of was 31 feet long, denies that it weighed 250 pounds, admits they were, that is to say, plaintiff and the defendant Joe H. Myers, carrying the joint of pipe on their shoulders and that plaintiff was at the front end of said pipe and leading

the way, with his back to the defendant Joe H. Myers, denies that they or either of them came to any place where [fol. 11] roots of a sweet gum had rotted out and left any hole, denies *there* there was any visible hole in the ground, and denies that the defendant Joe H. Myers shifted said pipe from one shoulder to the other, and denies that said Joe H. Myers carelessly, negligently or in any manner what ever jerked said pipe, or in any manner caused plaintiff to step in a hole, or to lose his balance and fall, denies that the plaintiff fell violently to the ground, striking same in a twisted position, or that he in any manner caused said pipe to fall on plaintiff or to strike him on the back as alleged and denies that it did strike him on the back or in the region of his first and second lumbar vertebrae, as alleged in the complaint.

Defendant denies that as a result of any such fall as complained of and specifically denies that as a result of any negligence or carelessness on the part of the said Joe H. Myers, the plaintiff suffered the injuries complained of, and specifically denies that plaintiff's first and second lumbar vertebrae were separated and that he suffered any severe impact or concussion of the spinal cord near the first and second lumbar vertebrae, and denies that the ligaments in the region of the spinal cord near the first and second lumbar vertebrae were bruised and torn and that same was attended with adhesions, bleeding swelling or that any pressure was caused on the spinal cord causing any degeneration of the spinal cord and nerves running therefrom or that any motor and sensory paresis resulted therefrom and denies that there is loss of sensation of the lower extremities and loss of locomotion of the legs, back and hips or any partial paralysis caused thereby, as a result of any injury described by plaintiff in his complaint and denies that plaintiff's injuries will gradually grow worse.

Denies that plaintiff suffered any injury to the Sacro Iliac joints with any contusions thereof or of the surfaces [fol. 12] of same and *and* denies that he has suffered any traumatic Sacro Iliac Arthritis as a result of the things complained of.

Denies that plaintiff suffered any injury to the Pelvic bone at the time or place alleged in his complaint, or any curvature of the spine, or any loss of sexual function or any injury to the bladder or rectal centers, or loss of control

of his bowels and that said condition will progress and grow worse and denies that on account of any injuries alleged to have been received on the day alleged or at the place alleged the health of the plaintiff has become greatly impaired, his nervous system damaged and impaired and denies that such injuries are permanent, or that they will grow worse and that he will suffer and has suffered severe mental and physical pain and mental anguish, denies he was in good health and sound physical condition prior to the date of the alleged injuries, denies that he was earning 48 cents per hour at the time, that he worked regularly or that he had a reasonable expectancy of promotion or that his earning capacity would have increased, and denies that on account of any injury occurring to him at the time and place alleged, if any did occur, which is denied, he is unable to perform manual labor or work, or will be so incapacitated for the rest of his life and denies that at the time and place complained of the plaintiff was in the exercise of ordinary care for his own safety.

It denies that the injuries complained of, if any were sustained, were caused by the sole negligence and overt acts of negligence of said Joe H. Myers, a defendant herein and denies that such negligence consisted of said Joe H. Myers suddenly shifting said pipe and jerking same so as to cause the plaintiff to stumble and fall in a hole as complained of and denies that he has suffered and will suffer great bodily pain and anguish or physical impairment on account thereof and denies that he has been damaged in the sum of $75,000.00 or any other sum by reason of the acts [fol. 13] and things complained of.

Further answering this defendant said, that if the plaintiff is suffering any of the things complained of they are not the result of any injuries received on the day and date complained of nor at the place and under the circumstances detailed in plaintiff's complaint.

Defendant alleges that if any injury was sustained that it was the result of the plaintiff's own carelessness and negligence in failing to properly carry said pipe and to properly choose a safe method of carrying the same and a safe footing while carrying the same; that said pipe was only 21 feet long—2½ inches in diameter and weighed only 130 pounds per joint and the carrying of same was a simple operation calling for no special skill or experience and

causing no strain on any able bodied man and was not dangerous to plaintiff and that he assumed all risks of any dangers that he could reasonably foresee on account thereof and the risk of all dangers attendant thereon that could not be reasonably foreseen.

Wherefore, the defendant, Phillips Petroleum Company, without waiving any rights asserted in its petition for removal of this cause to the Federal Court heretofore filed herein and specially saving and reserving its exceptions to the ruling of the court in denying said petition for removal, files this separate answer to the complaint of the plaintiff herein and prays that plaintiff take nothing by reason of his complaint, as against it, and that it have its costs in this cause expended and all other proper relief, as it will ever pray.

Phillips Petroleum Company, Deft., by Mahony & Yocum, E. E. Godwin, Marsh & Marsh, Its Attorneys. Neil Marsh.

[File endorsement omitted.]

[fol. 14] In Circuit Court of Ouachita County

Verdict

"We the jury find for the plaintiff against the defendants Phillips Petroleum Co. and Joe H. Myers and assess the plaintiff's damages at $50,000.00.

J. W. Harrell, Foreman."

[fol. 15] In Circuit Court of Ouachita County

#3860

R. O. Jenkins

vs.

Phillips Petroleum Co. et al.

Judgment—Sept. 29, 1934

Now on this the 29th day day of September, 1934, the same being a regular day of the July Term of the Cir-

cuit Court of Ouachita County, Arkansas, Second Division, this cause coming on to be heard, comes the plaintiff, R. O. Jenkins, in person, and by his attorney, L. B. Smead, and comes the defendant, phillips Petroleum Company, by its attorneys, Marsh & Marsh, Mahony & Yocum and Gaughan, Sifford, Godwin & Gaughan, and comes the defendant, Joe H. Myers, in person, and by his attorneys, Marsh & Marsh, Mahoney & Yocum and Gaughan, Sifford, Godwin & Gaughan, and each of said parties announced ready for trial.

Thereupon, a jury composed of J. W. Harrell, and eleven others from the regular panel of the petit jury selected, impaneled and sworn, according to law, to try the cause.

The jury having heard the evidence adduced, the instructions of the Court and the argument of counsel, retire to consider its verdict, and afterwards on the same day returned into Court the following verdict.

"We the jury, find for the plaintiff against the defendants, Phillips Petroleum Company, and Joe H. Myers, and assess the plaintiff's damages at $50,000.00.

J. W. Harrell, Foreman."

It is therefore, by the court ordered and adjudged that the plaintiff R. O. Jenkins, do have and recover of and from the defendants, Phillips Petroleum Company and Joe H. Myers, and each of them, the sum of Fifty Thousand Dollars ($50,000.00) together with all his costs herein expended for which execution may issue.

[fol. 16] In Circuit Court of Ouachita County

Motion for New Trial—Filed Dec. 3, 1934

Comes now the Phillips Petroleum Company, one of the defendants herein, and moves the court to set aside the verdict of the jury, heretofore rendered herein, and to vacate the judgment of this court rendered thereon, and to grant it a new trial, and, for cause thereof, says:

First: Because the verdict of the jury is contrary to the law.

Second: Because the verdict of the jury is contrary to the evidence.

Third: Because the verdict of the jury is contrary to the law and the evidence.

Fourth: Because the verdict of the jury and the judgment of the court rendered thereon is for an excessive amount of damages.

Fifth: Because the excessive verdict of the jury appears to have been given under the influence of passion and prejudice.

Sixth: Because the court erred in overruling defendant's motion and petition for removal of this cause to the District Court of the United States, Western District of Arkansas, El Dorado Division, and in retaining jurisdiction thereof after petition for removal, notice of removal and bond for removal had been filed herein, to which ruling of the court the defendant, Phillips Petroleum Company, at the time excepted and asked that its exceptions be noted of record.

[fol. 17] Seventh: Because the court erred in overruling defendant's amendment to petition for removal of this cause to the District Court of the United States for the Western District of Arkansas, El Dorado Division, and in retaining jurisdiction thereof after said amendment had been filed, and to which ruling of the court the defendant, Phillips Petroleum Company, at the time excepted and asked that its exceptions be noted of record.

Eighth: The court erred in refusing to give in charge to the jury this defendant's requested written instruction Numbered 1, to-wit:

"You are instructed to return a verdict for the defendant, Phillips Petroleum Company".

To which refusal of the court to give said instruction to the jury the defendant, Phillips Petroleum Company, at the time excepted and asked that its exceptions be noted of record.

The error of the court in refusing to give said instruction was in this, to-wit: the only negligence alleged in the complaint was that of the individual defendant, Joe H. Myers, who was a fellow-servant of the plaintiff, and the evidence offered in the trial of the case tended to prove neg-

ligence only on the part of said defendant and the plaintiff. Under these facts, it clearly appeared that if the plaintiff was injured as alleged in his complaint, it was because of negligence on the part of himself and/or said individual defendant, and contributory negligence on his part and/or the negligence of his fellow servant, Joe H. Myers, was a good and complete defense to the plaintiff's cause of action, [fol. 18] and Sections 7137 and 7145 of Crawford & Moses' Digest of the Statutes of Arkansas, which purport to deprive this defendant of said defenses, are unconstitutional and void, in that they violate and contravene Section 1 of Article 14 of the Constitution of the United States of America in the respects hereinafter alleged.

Ninth: The court erred in giving in charge to the jury, over the objections of this defendant, plaintiff's requested instruction numbered 1, to-wit:

"You are instructed that if you find from a preponderance of the evidence that plaintiff and defendant, Joe H. Myers, in the performance of their duties as employees of the defendant, Phillips Petroleum Company, were carrying a joint of pipe as alleged in the complaint, the front end of said pipe resting on plaintiff's shoulder, and the rear end of said pipe resting on the shoulder of the defendant, Joe H. Myers; and you further find from a preponderance of the evidence that the defendant, Joe H. Myers, without warning, shifted said pipe from one shoulder to the other and jerked said pipe; and you further find that said shifting and jerking of said pipe without warning constituted negligence; and you further find, from a preponderance of the evidence, that, as a direct result of such negligence on the part of Joe H. Myers, in so shifting and jerking said pipe without warning, plaintiff lost his balance and fell and was injured, and you further find that the plaintiff was, at the time, in the exercise of due care [fol. 19] for his own safety, and had not assumed the risk, then you will find for the plaintiff and against both the defendants."

To the ruling of the court in giving said instruction defendant excepted and asked its exceptions be noted of record.

That said instruction is misleading and erroneous in this, to-wit: That it makes this defendant respond in damages for an act of its servant resulting in injury to his fellow-servant and is based on Sec. 7137 of Crawford & Moses' Digest of the Laws of Arkansas, and that same is invalid as violating the Fourteenth Amendment to the Constitution of the United States, Sec. 1, in that this defendant, a corporation, is a citizen and that it is denied equal protection of the laws in its property rights with other citizens of Arkansas who are individuals, in that said law (Sec. 7137 C. & M. Digest) attempts to make it respond in damages to its servant for the negligence of a fellow-servant, but does not impose upon individuals employing servants the duty to respond in damages to a servant for the negligent act of a fellow-servant, and that it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine.

Tenth: That the court erred in giving in charge to the jury plaintiff's written instruction No. 2, over the objection of the defendant, Phillips Petroleum Company, which in- [fol. 20] struction is as follows, to-wit:

"You are instructed that if you find for the plaintiff, your verdict will be for such an amount of damages as you find from a preponderance of the evidence in this case, will reasonably compensate the plaintiff for all physical pain and mental anguish suffered or endured by him on account of the injuries complained of, if any; also any further physical pain and mental anguish which the evidence may show with reasonable certainty the plaintiff will suffer and endure on account of the injuries sustained by him, if any; also any pecuniary loss heretofore suffered by the plaintiff on account of the injuries complained of, if any; and also such sum as will reasonably compensate the plaintiff for any damages which the evidence shows with reasonable certainty he will suffer in the future on account of diminished capacity for earning money, if any; provided, however, if you find that the plaintiff was himself guilty of negligence contributing to his injury, then you will find for the defendant, Joe H. Myers, and as to

the defendant, Phillips Petroleum Company, you will diminish the plaintiff's damages, if you find he is entitled to recover in proportion to the amount of negligence found by you to be attributable to the plaintiff."

To the ruling of the court in overruling said objections and in giving said instruction in charge to the jury this defend-[fol. 21] ant at the time excepted and asked that its exceptions be noted of record.

Said instruction was misleading and erroneous in this, to-wit: in said instruction the court charged the jury that contributory negligence on the part of the plaintiff was a complete defense for the defendant, Joe H. Myers, but that, as against the defendant, Phillips Petroleum Company, such negligence on the part of the plaintiff would diminish his damages, if he should be entitled to recover, in proportion to the amount of negligence found to be attributable to the plaintiff. This defendant, Phillips Petroleum Company, is a corporation organized under the laws of the State of Delaware and is therefore a resident and citizen of said State and of the United States of America. The plaintiff and the defendant, Joe H. Myers, were, at the time of the commencement of this suit, and since and now are, residents and citizens of the State of Arkansas. Said charge was, and is, based solely upon Section 7145 of Crawford & Moses' Digest of the Statutes of Arkansas. The only negligence alleged by the plaintiff was of and on the part of the defendant, Joe H. Myers, and, under said charge, the jury was instructed that it might find for the plaintiff and against the defendant, Phillips Petroleum Company, and for the defendant, Joe H. Myers, and against the plaintiff. Said Section 7145 and the charge of the court thereon were, and are, in violation and contravention of Section 1 of Article 14 of the Constitution of the United States of America in depriving this defendant, Phillips [fol. 22] Petroleum Company, of its property without due process of law and in depriving said defendant of the equal protection of the laws, and said section of the Arkansas Statute is unconstitutional.

Wherefore, this defendant, Phillips Petroleum Company, respectfully prays that the verdict of the jury herein be set

aside and the judgment rendered herein be vacated, and that it be granted a new trial, and for all other proper relief.

Mahony & Yocum, Marsh & Marsh, by H. S. Yocum, for Phillips Petroleum Co., Defendant.

[File endorsement omitted.]

IN CIRCUIT COURT OF OUACHITA COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL

Thereupon, on the 3rd day of December, 1934, a day of the same Term, and at the time set by the Court, the said motion for new trial was presented to the court, and was by the court overruled, to which ruling of the court in refusing to set aside the verdict of the jury, and vacate the judgment of the court thereon, and grant a new trial herein, and in overruling said motion therefor, the defendant at the time duly saved its exceptions, and its exceptions were [fol. 23] duly noted of record.

Thereupon, defendant was granted ninety (90) days from December 3, 1934, within which to file its bill of exceptions in this cause, and upon the prayer of defendant it was granted an appeal to the Supreme Court of Arkansas.

[fol. 24] IN CIRCUIT COURT OF OUACHITA COUNTY, SECOND DIVISION

No. 3860

R. O. JENKINS, Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY and JOE H. MYERS, Defendants

Bill of Exceptions

Be it remembered, that on the 27th day of September, 1934, being a day of the July Term, 1934, of the Ouachita Circuit Court, Second Division, before the Honorable W. A. Speer, the regular Judge of said Court, and a jury, duly

empanelled, the above entitled cause came on for trial, and in the course thereof evidence was introduced, objections made, exceptions taken and saved, and other proceedings had, which are as follows, to-wit:

[fol. 24a] The Plaintiff, to Sustain the Issues on His Behalf, Introduced the Following Testimony, to-wit:

R. O. JENKINS (the plaintiff), being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. L. B. Smead:

Q. Your name is R. O. Jenkins?
A. Yes, sir.
Q. How old are you Jenkins?
A. I was twenty-eight this past August 20th.
Q. Twenty-eight this past August 20th?
A. Yes, sir.
Q. When were you injured?
A. April 5th.
Q. April 5th, 1934?
A. Yes, sir.
[fol. 25] Q. At that time you were twenty-seven years old?
A. Yes, sir.
Q. Who were you working for when you were hurt?
A. Phillips Petroleum Company.
Q. Where were you working?
A. We were working in the Flemming Bottom.
Q. Tell the jury where that is?
A. Well, it is on Smackover Creek; in Smackover bottom below Kenova.
Q. What?
A. In the Smackover bottoms below Kenova.
Q. About how far below Smackover was it there?
A. Well, sir, I could not say exactly; about something like three or four miles.
Q. In Union County, Arkansas?
A. Yes, sir.

Q. How long had you been working for the Phillips Petroleum Company?

A. I signed up with the Phillips Petroleum Company on the 12th day of February.

Q. 1934?

A. Yes, sir.

Q. How long had you been engaged in doing oil field work?

A. Ever since 1924.

Q. Where is your home?

A. Logansport, Louisiana.

[fol. 26] Q. How long have you been living in Arkansas, or, had at that time?

A. I have been here off and on ever since 1924.

Q. Since 1924?

A. Yes, sir.

Q. Have been doing oil field work?

A. Yes, sir.

Q. Is that the only kind of work you have ever done—manual labor?

A. Yes, sir: that is the only kind.

Q. What education have you?

A. I haven't got any; just write my name a very little.

Q. Are you qualified to do any kind of work except manual labor?

A. No, sir.

Q. What schooling have you had?

A. Third grade?

Q. Went to the third grade?

A. Yes, sir; just passed to the third grade.

Q. Now, the defendant Joe H. Myers, was he working for the Phillips Petroleum Company in the same gang you were?

A. Yes, sir.

Q. What kind of work were you doing the morning you were hurt?

A. Carrying pipe.

Q. Explain to the jury, and talk so that — can understand you?

[fol. 27] A. We were stringing a two and a half inch upset tubing line. I understood it was to be a gas line; that is what we were laying it for.

Q. How did you do that—explain to the jury?

A. Well, we got the wagon—drove up as far as they wanted to put the mules to this low flat we were stringing the line across, on account of it being soft; and they unloaded the pipe on the ground, and we were stringing it nearly as fast as one man could pull off the joint of pipe, off of the load. The line was coming up from the rear, and we were carrying it over there just joint by joint as we went along, laying it down.

Q. In other words, the further you laid the pipe the farther you had to carry the pipe to put it on the end joint?

A. Yes, sir.

Q. What were you—at the time you were hurt—you fell—what were you and Joe H. Myers doing?

A. Carrying a joint of this same pipe; two and a half inch up-set pipe.

Q. Where did you get that joint of pipe?

A. Where the wagon unloaded it.

Q. How far was that from where you were supposed to carry it and deposit it?

A. Something like thirty or forty yards; may be a little farther.

Q. May be a little bit farther?

A. Yes, sir.

[fol. 28] Q. What kind of pipes, or pipe, was this that you were carrying?

A. Two and a half inch up-set.

Q. Two and a half inch up-set?

A. Up-set tubing.

Q. You mean, two and a half inches in diameter?

A. Yes, sir. Up-set means it is up-set in the collar. It is bigger in the collar than at the pipe.

Q. It is bigger at the collar?

A. Yes, sir.

Q. How long was the joint of pipe?

A. It was about thirty-one or two feet long.

Q. Thirty-one or thirty-two feet long?

A. Yes, sir.

Q. How much would the joint of pipe weigh, if you know?

A. I never did get the correct weight of one. I would imagine about two hundred and fifty pounds.

Q. You think it would weigh about two hundred and fifty pounds?

A. Yes, sir.

Q. Two and a half inch pipe, thirty-one or two feet long?

A. Yes, sir.

Q. How were you carrying this joint of pipe; that is, how were you carrying your part of it?

A. Carried it on my right shoulder.

[fol. 29] Q. You were carrying your end of it on your right shoulder?

A. Yes, sir.

Q. How did Joe Myers have his end of the pipe?

A. Well, I picked up my end and stepped—my end was in a little water, and I stepped out there to pick up my end, and he walked around the pipe and picked up the pipe and put it on his right shoulder. We both had it on the right shoulder. I stepped up, and stopped, and he walked around the water.

Q. What shoulder did he have the pipe on when he picked up?

A. On the right shoulder.

Q. And you had yours on the right shoulder?

A. Yes, sir.

Q. Explain to the jury—you were in front; you were in front of Myers?

A. Yes, sir.

Q. With the front end of the pipe on your right shoulder, and he was back of you, walking in the same direction, with the other end on his right shoulder?

A. Yes, sir.

Q. Explain to the jury just how you happened to fall; how you fell, and the circumstances about it?

A. We were walking like that (indicating one in front of the other), and he was behind. I stepped over some trash, and a bad looking place, and to see that he made it all right [fol. 30] I glanced back over my left shoulder, like this (illustrating to jury), and he still had the pipe on his right shoulder.

Q. How came you to fall—what did you fall in?

A. In a ditch. Looked like where an old sweet-gum stump had rotted out, and there was a hole practically eighteen inches deep, just estimating it, and five feet long.

Q. About five feet long and eighteen inches deep?

A. Yes, sir.

Q. And how wide?

A. About eighteen inches wide.

Q. About eighteen inches wide?

A. Yes, sir.

Q. Was that in the path that you had to follow?

A. Yes, sir.

Q. In carrying the pipe?

A. Yes, sir.

Q. Had you carried any joints of pipe before that, that morning?

A. Yes, sir; we carried out of the same path; we carried four or five joints.

Q. You went the same route with all of them?

A. Yes, sir.

Q. Just tell the jury, now, why you happened to fall. [fol. 31] Tell the jury what happened at that time, Jenkins?

A. As I went to step over the hole Joe changed shoulders—my estimation of it; because when I looked—(interrupted).

Q. Tell them what happened?

A. I fell in the hole. First, before I fell, as we were walking along I felt a jerk like that (illustrating), and then another one, as I was in the act of stepping the hole.

Q. As you were fixing to do what?

A. In the act of stepping the hole.

Q. Over the hole?

A. Yes, sir; over the hole. As I looked around; the next thing I knew I looked around, and I had my right arm under me like that, and I was lying cross-ways, sitting in the hole, with my left foot on the bell of the hole.

Q. Where did the pipe fall?

A. It struck me across the back.

Q. How far above your belt?

A. Just about six inches above the belt, there (indicating).

Q. It struck you about six inches above the belt line?

A. Yes, sir.

Q. You fell on which side?

A. On my right side, and my left leg was in the hole, you see.

[fol. 32] Q. You say—what position did you fall in? Did you fall in a straight position, or twisted position?

A. I fell with my right arm like this (indicating) and my left foot in the hole. I suppose you would call it a twisted position; and the pipe struck me across there (indicating). And I reached with my left arm and tried to get it out of the way. And Joe was standing there laugh-

ing, and I asked him to get it off of me; and he laid his end down, and picked it up, and I slid out from under it. About that time another fellow came up, and he asked me if I was hurt very bad, and I says, "I don't know", I says, "I feel funny". That was Mr. Grayson.

Q. Who was Mr. Grayson?

A. He was another man in the gang.

Q. Before you get away from that. I don't believe you are clear. What happened when you stepped over the hole? Go over that again, with reference to what Joe Myers did?

A. He changed the pipe from one shoulder to the other as I was in the act of stepping over the hole, and I fell.

Q. Let's get through with that before we pass it—Could you see him, or not?

A. No, sir.

Q. You were looking forward?

A. I was looking forward.

Q. Did you see the hole there?

A. I had to watch where I was going.

[fol. 33] Q. You saw the hole?

A. Yes, sir.

Q. You were looking at it as you were stepping over it?

A. Yes, sir.

Q. Tell the jury how you knew the pipe was moved from one shoulder to the other?

A. I felt the sudden jerk.

Q. Did you feel the pipe move?

A. Yes, sir. It was on my shoulder, and I felt it jerk like that (illustrating), and he had it in his left arm.

Q. When you looked back?

A. After I was down. I asked him to get it off of me.

Q. Explain, as well as you can, how you felt the pipe move; show the jury.

A. Just suddenly.

Q. Tell the jury how you know he changed it from one shoulder to the other?

A. I felt the jar.

Q. Did you feel the pipe raise up and go over?

A. Yes, sir; I could feel it as well as, almost as if I was looking at it.

Q. I want you to explain to the jury how you felt it move—just all about it?

A. I felt the pipe raise up. As it come up it gave me a [fol. 34] jar, like that (illustrating), and as it come down I felt the jar, and I went in the hole.

Q. Had the pipe moved over before the second jar?

A. Before the second jar?

Q. Yes?

A. Yes, sir; moved on my shoulder.

Q. You could tell by the movement of your end of the pipe that the other end of the pipe went up, and over?

A. Yes, sir; I could feel it.

Q. Which direction was the first jerk, if you know, forward or backward?

A. It was forward.

Q. And the second jerk?

A. It was backward.

Q. Were those jerks—was it a violent jerk, or kind of pushing forward and backward?

A. It was a violent jerk.

Q. Both of them were violent jerks?

A. Yes, sir.

Q. I believe you say it caused you to lose your balance and fall in the hole?

A. Yes, sir; it broke the stride in stepping.

Q. Explain to the jury just what your physical feeling was after you fell down, with reference to pain, or anything of that kind; in your own opinion, tell the jury how you fell, and what happened?

[fol. 35] A. Well, I felt like a fellow that had a hard chill. Big drops of sweat stood out on my forehead, and I felt funny, and I turned sick at my stomach. I kept sitting around there; I didn't say anything to any of them. Mr. Forsythe—he was fixing to put some grease on the wire brush to clean the collars with—we didn't think to bring any along, and he was going to get some, and he said for us to string that pipe while he was gone.

Q. Who was your foreman, Jim Forsythe?

A. Yes, sir.

Q. Were you carrying the pipe under his directions?

A. Yes, sir.

Q. And you and Joe Myers were in the performance of your duties for the Phillips Petroleum Company at that time?

A. Yes, sir.

Q. Joe H. Myers was a fellow servant, working for the same company?

A. Yes, sir.

Judge Marsh: Don't lead the witness.

Mr. Smead: That is an immaterial matter. I just wanted to get it straight to save time.

Mr. Smead (continuing):

Q. Just go ahead and explain to the jury in your own way just what happened, where you went, where you went after that, and how you got there?

A. I pulled myself up, and when I got up, I thought I [fol. 36] might get to feeling better, but I wasn't feeling any better so I sat down on a log, I suppose as far as to the cuspidore from me, and I stayed there a little bit, and I kept getting sicker and weaker, and I thought I would walk over to a stump, as far as from here to the door (indicating), and I sat down. While I was sitting there Mr. Forsythe came up, and some of them mentioned it to him, and he says, "Are you hurt very bad", and I says, "I don't think so", just like that, you know. They went on about their work. So, I got up. He (meaning Forsythe) sat the grease down at the pipe that we had headed—three or four joints; and he sat it down there, and I got up to see if I could grease the pipe. When I moved around I got nervous and jerkified, and sick, and felt like I was going to faint. And I walked over there—there was another load of pipe cross this low flat place, they had unloaded, and they went over there to look at that. In the meantime we had strung our pipe a little wrong——

Q. We don't care about that detail. Go ahead and tell what happened?

A. They walked over there, and I tried to make it over there; and I got right up close—pretty close—and there was a log there, and I sat down on that log, and I kept feeling sick and fainty-like. I was going to get up anyhow, so I got up and started. In the meantime they walked back across to re-construct this line; we had started it wrong. So I went, then—started off, and Mr. Forsythe hollered [fol. 37] and says, "Are you going in, Jenkins", and I shook my head I believe I would, and he says, "How are you going", and I told him I didn't know; shook my head. I didn't speak.

Q. Why didn't you speak?

A. I didn't feel like it. I tried to, and he didn't hear me, and that is the only way I could make him understand.

Q. How did you get in?

A. Mr. Odin got me and carried me to the car—held my arm—and taken me to the doctor's office; and the doctor taken me to El Dorado to the X-ray man. And he brought me back home and put me on the bed, and I stayed there practically ten days. I forget the number; I don't remember how many days it was before I was able to go to his office.

Q. Who is this you are talking about?

A. Doctor S. S. Henry.

Q. You went to the Doctor's office?

A. Yes, sir. And he carried me down there about—he made a couple or three trips; one a day; he came to see me every day; sometimes in the afternoon. Every morning about eight o'clock, and sometimes in the afternoon. And so, I didn't like the way I was getting along—of course, when a fellow is suffering he suffers so much I suppose he feels different. I didn't think he was giving me the treatment I ought to have; and I would ask him about my condition, and all he ever said "you have got a mighty bad [fol. 38] back; you will be all right in possibly a few weeks."

Q. Where did you go then?

A. I called Mr. Odin up——

Q. Who is Mr. Odin?

A. The superintendent for the Phillips—Oldham, or Odin.

Q. You called him up?

A. I had my brother-in-law to go and call him, and they come out and looked at me, and says, "well, we will move you in a little bit", and they walked out of the house. So, after a while they brought Doctor White out there, and he came out and made an examination.

Q. This Doctor White; that is Doctor White, of El Dorado?

A. Yes, sir.

Q. He is the Company's doctor—did the company send him to you?

A. Yes, sir.

Q. How long did he treat you, Mr. Jenkins?

A. He treated me from the 21st; that was about the 21st of the month; he treated me to the first. He put me in the hospital.

Q. How long did he treat you?

A. From the 21st to the first of April.

Q. 21st of what?

A. April.

[fol. 39] Q. He treated you from the 21st of April to the 1st of what month?

A. May; in the hospital; and then they carried me back. They carried me back several times; I don't know how many trips I made. He was giving me shots for pyorrhea and lumbago.

Q. What?

A. Lumbago. For my teeth and mouth, in other words. So Mr. Odin says, "I cannot take you up here, anyway, every other day"; they were carrying me. The next trip, I forget whether it was Friday, or Monday—Saturday or Monday—Doctor White told him whatever day was convenient—said Mr. Smith or some of the boys would take me up, and none of them has ever showed up.

Q. And the Phillips Petroleum Company didn't take you down to the doctor any more?

A. No, sir. On the 14th I called Doctor Henry up and asked him to come see me—(interrupted)

Q. At any rate, Jenkins, since you were hurt, you tell the jury, or, tell the jury, with all the treatment you had, both in and out of the hospital, did your condition grow beter or worse?

A. Worse.

Q. Can you tell the jury, so they can understand, how you got worse, or how you feel worse, if you do?

A. My feet from the hips down are heavy, and have a [fol. 40] dead feeling; don't feel nothing like natural; anyway, at no time since I have been in the hospital; since I got worse with the soreness in the back.

Q. What was the condition of your back where the pipe hit you, and your feeling, with reference to pain, or feeling; what about that place in your back there, with reference to whether it is painful now, or not?

A. It is not painful in the back, but hurts up over each hip.

Q. Did your back hurt at first?

A. Yes, sir; it was sore. It didn't seem to be—there was plenty of pain there, but I could not tell whether it was soreness, or what.

Q. What is the feeling of your back, back there now?

A. There is no feeling, you might say, from there down (indicating).

Q. Just like it is dead?

A. Yes, sir.

Q. I notice your walk is an unsteady and jerking walk; when did that start, and tell the jury how that came on you?

A. It has been that way; it started the day I got off of the bed to try to go to the doctor's office.

Q. Has it grown better, or worse?

A. It has grown worse.

[fol. 41] Q. Grown worse all the time?

A. Yes, sir.

Q. How much pain, if any, have you suffered since you were hurt, explain to the jury?

A. I cannot explain it; I just suffered death. It seems to me that I cannot make another day, now.

Q. With reference to the pain, where do you hurt?

A. All the pain through here (indicating) is about a six-inch space over each hip-bone; over this muscle right in there (indicating); over right in there (indicating) as near as I can show you. And there is a dull ache up back of my neck, right about there (indicating).

Q. What about the pain in your side; you testified about a pain in your side. Has that been there all the time, or just at some times?

A. You mean regularly?

Q. Yes, sir.

A. Yes, sir; it is there continuously.

Q. There all the time?

A. Yes, sir.

Q. Is it severe pain, or not?

A. It is awful severe hurting.

Q. What about sleeping at night; does it bother you?

A. Yes——

Q. In that respect?

[fol. 42] A. I get a couple of hours and a half of sleep at a time.

Q. Why don't you sleep any more?

A. It hurts so bad that I cannot.

Q. It hurts so bad that you cannot sleep?

A. Yes, sir.

Q. Now, has there been any effect on your bowels, or action of your bowels?

A. Yes, sir.

Q. Explain that to the jury?

A. Well, it is dead; I don't feel anything there; just slips from me.

Q. You mean your bowels move in your pants without you knowing it is going to happen?

A. Yes, sir; without any feeling.

Q. Has that condition been the same, or grown worse?

A. It grows worse; and my kidneys are the same way.

Q. You pass your urine without knowing it?

A. Yes, sir.

Q. You wet your pants all the time?

A. Yes, sir.

Q. Has that condition grown better or worse?

A. It is getting worse.

Q. What about your general condition that you have testified that resulted from your injury; does that stay the [fol. 43] same, or does it grow worse?

A. That grows worse.

Q. All of the conditions you have testified about?

A. Yes, sir.

Q. Prior to this injury that you received, what was your health, the condition of your health?

A. Well, I never was sick; never had any pains any places; felt like a young mule all the time. No man in the country could out work me.

Q. You were strong and healthy, both mentally and physically?

A. Yes, sir.

Q. Mr. Jenkins, while you were working for the Phillips Petroleum Company you were hurt—hurt one of your toes?

A. Yes, sir; on the 6th day of March.

Q. How did that happen?

A. Well, we were dragging——

Q. Don't go into detail. Did you drop something on it?

A. A joint of two and a half inch up-set tubing.

Q. Dropped on your toe?

A. Yes, sir; drug one of my toes.

Q. Is that the only injury you received?

A. Yes, sir.

Q. That got well and you went back to work?

[fol. 44] A. Yes, sir.

Q. Now, explain to the jury with reference to feeling in your legs; can you feel anything?

A. The feeling in my leg—the kind of feeling?

Q. Yes, and where?

A. I have no feeling, except where this bone is up here (indicating).

Q. I mean, if I put my hand on your leg, can you feel that (counsel putting hand on plaintiff's leg)?

A. I can feel it a little bit. It is not natural.

Q. Your leg is numb?

A. Yes, sir; numb—dead like.

Q. You can feel that (putting hand on leg)?

A. It don't feel like it is there. It feels like you are touching me here (indicating).

Q. What about your nerves?

A. Well, they are shot.

Q. Do you mean, are you extremely nervous all the time, or not?

A. Yes, sir.

Q. I notice you perspire freely all the time; what is the cause of that, if you know?

A. Mostly pain.

Q. Which?

A. Mostly pain.

Q. Have your sexual functions and powers been affected [fol. 45] in any way?

A. Yes, sir.

Q. To what extent—what about that?

A. Well, I just have no use for them.

Q. You have lost, on account of this injury, your sexual powers and functions?

A. Yes, sir.

Q. You are not able to have sexual intercourse?

A. Yes, sir.

Q. Have you been able to since the injury?

A. Not since the injury.

Q. How much money were you earning at the time you were injured?

A. Well, the best I can remember, they said they were paying forty-eight cents per hour.

Q. How many hours a day?

A. $3.80 for eight hours.

Q. You worked eight hours and got forty-eight cents an hour—how many days a week did you work?

A. Five days a week; we were off two.

Q. What had you been making? As I understand, at that time they were not working the crew full time?

A. Yes, sir; were off two days a week.

Q. You were off two days a week; that was because of the present condition?

A. It was the code; NRA Code.

Q. The Government required you to do that?

[fol. 46] A. Yes, sir.

Q. What had you been making before that; say, two or three years ago?

A. Well, I drew—up until 1929 I wouldn't take a job——

Q. When?

A. 1929. I wouldn't take a job for less than $4.50 a day.

Q. That was the customary wages for your kind of work?

A. Yes, sir. I never drew two checks, from 1924 until 1929, the latter part of 1929 or the first of 1930, for less than $6.00 a day.

Q. Of course you expected to receive promotion and get more?

A. I was offered one, but I could not take it because I didn't have the education.

Cross-examination.

By Mr. Yocum:

Q. Jenkins, what is your given name?

A. Roy Otto Jenkins; my full name.

Q. Where did you say you were raised?

A. I was raised at Logansport, Louisiana.

[fol. 47] Q. Where is that?

A. Forty miles beyond Shreveport, on the line of Texas and Louisiana.

Q. You say you have been working in the oil field since 1924; for what companies have you worked?

A. Texas Company; worked for the Sure Oil Company; a contractor, David Crockett and Walls; and for the Skelly

Oil Company. I cannot call over just all I have worked for.

Q. When did you work for The Texas Company?

A. I worked for them from 1923 to 1924, in the Pipe Line Department.

Q. What was the next company you worked for?

A. Sure Oil Company, in 1924; when I came to Smackover.

Q. And the next Company?

A. The Skelly Oil Company.

Q. The next?

A. Old man David Crockett and Walls; I worked for them—contractors.

Q. What year?

A. I believe it was in 1925 or 1926.

Q. Then who did you work for?

A. Worked for the Simms.

Q. What year?

A. 1926, some time.

Q. Who was the next employer?

[fol. 48] A. I will tell you, I could not say; first one and another. I would exchange from one to the other.

Q. Don't you remember who they were?

A. No, sir; I don't.

Q. You don't remember any company, or person, that you worked for since 1926?

A. Simms, in Big Springs, Texas, in 1929, was the last company that I worked for; and the Macmillan Petroleum Company. I was working on the extra-board for them, whenever I could, for a few days.

Q. When did you work for the MacMillan Petroleum Company?

A. This year, and the last part of last year.

Q. Before you went to work for the Phillips?

A. Yes, sir.

Q. Was all of the work you did in the oil fields done in Union County, except in 1929, when you were in Texas?

A. I worked all over the field; any place I could get a job.

Q. In Arkansas?

A. Yes, sir. I could not say whether it was in Union County, or whether it was in Ouachita County I worked.

Q. Can you say whether it was in Arkansas?

A. Yes, sir.

Q. But you cannot give us the names of any of the parties or companies that you worked for between 1926 and 1929?

[fol. 49] A. Yes, sir; old man David Crockett, and then he joined partners in Jackson with another party.

Q. You say David Crockett?

A. Yes, sir.

Q. He is an oil producer, or contractor?

A. Contractor.

Q. Where?

A. He lives at Minden, Louisiana, his home; he contracts wherever he can get a contract.

Q. Did you get hurt while you were working for any of these other people?

A. No, sir.

Q. Didn't you get hurt while you were working for Macmillan?

A. No, sir—well, I got a boil. I got some caustic on my thumb, and caused a rising—carbuncle. Caustic burns deep. What they wash the paint off of these big oil drums with.

Q. You worked for the Macmillan then?

A. Yes, sir; that time.

Q. How much time did you lose?

A. Well, I didn't lose any; I was on the extra-board, and I was off at the time.

Q. Now, you went to work for the Phillips on the 12th day of last February, I believe?

A. Something like that; twelfth or thirteenth.

[fol. 50] Q. How long did you work?

A. I worked to the 6th day of March, when I got my toe broke.

Q. Then how long were you off?

A. I was off until the first day of April.

Q. Off until the first day of April; and then what was the date of the accident for which you are suing?

A. 5th.

Q. This accident happened in Union county; is that right?

A. That is right.

Q. How many suits have you had for that accident?

A. Never had any.

Q. This is the first suit you filed?

A. This is the first time I have ever been in court.

Q. The suit originally filed was filed in Ouachita county; in this court here?

A. Yes, sir.

Q. Now, I understood you to say that the place of the accident was in a creek bottom?

A. Yes, sir.

Q. And that the ground was soft?

A. I reckon it was called a creek bottom; the creek was all over it.

Q. And they could not drive this team far out in the bottom; they had to unload the pipe back here on the firm [fol. 51] dirt, and you and the other men carried it out?

A. That is the way we did it. We argued the question among ourselves why they didn't string it across.

Q. I understood you to say on direct-examination that the ground was soft?

A. Which?

Q. Was the ground soft and boggy?

A. In spots, yes, sir.

Q. In spots?

A. Yes, sir.

Q. And they unloaded this pipe there about the well, didn't they?

A. Yes, sir; about thirty or forty steps of the well.

Q. How many joints of pipe had you carried before you fell?

A. We had carried practically four or five, I think. I cannot remember positively, but about five joints of pipe. We had the fifth, I think.

Q. And you and Myers carried together each time?

A. Yes, sir.

Q. How far had you carried this joint that you were carrying when you fell, before you fell?

A. Practically thirty or forty steps.

Q. How much farther did you have to carry it?

A. When I fell; how much farther was we to carry it?

[fol. 52] Q. Yes.

A. A little better than its length.

Q. What was the nature of the land; was it open land, or timbered land?

A. Well, it was flat, where the oil had killed all of the timber, and they burned it. There had been a forest at

one time, and the oil killed the timber out, and it was rotted, and the ground, most of it, was rough. There wasn't no hill, or anything like that. It wasn't too bad.

Q. You could walk in any direction that you wanted to, there?

A. No, sir.

Q. There was no trees or logs in your way?

A. Water.

Q. Water? There was no water there where you fell?

A. No, sir.

Q. How far were you from the water?

A. I could reach over and touch it with my hand.

Q. At the time you fell?

A. Yes, sir.

Q. You were walking along by a pond of water?

A. Yes, sir.

Q. Which side of you was the water on?

A. Both sides.

Q. How far were you walking from the place where they [fol. 53] were laying the pipe line?

A. I suppose four or five feet from the line—the joint we had just laid down.

Q. On which side of the line were you walking?

A. I was walking on the right-hand side of the line. The pipe was in the edge of the water.

Q. The pipe was in the edge of the water?

A. Yes, sir.

Q. Which side of the pipe line—which direction did the pipe line run?

A. I could not say.

Q. What direction were you walking at the time you fell?

A. Straight ahead.

Q. East, West, North, or South?

A. I could not say.

Q. You said that when you and Myers picked up this particular piece of pipe that you looked back?

A. I was standing looking at him when he picked it up.

Q. Standing looking at him when he picked it up?

A. Waiting for him to get his end up.

Q. Your back was to him?

A. No, sir; I was standing looking at the pipe like this (illustrating). He was getting that end (indicating), and I was getting the other.

[fol. 54] Q. Who shouldered the pipe first, you or Myers?

A. I did.

Q. When you shouldered it your back was to him, wasn't it?

A. No, sir; I was looking at him.

Q. How could you stand with your back—you were going to walk forward?

A. Just like this (illustrating). I come up like that.

Q. Hanging on the edge of your shoulder like that stick was?

A. It was up on my shoulder; in other words, just like that (illustrating with stick).

Q. What do you say this pipe would weigh?

A. Waiting for him to walk around the little puddle.

Q. How much did the pipe weigh?

A. About two hundred and fifty pounds.

Q. You don't know what the pipe weighed?

A. No, sir; I didn't weigh it.

Q. You say you think this pipe was thirty-one feet long; did you measure it?

A. I have measured quite a few of them.

Q. Did you measure this joint?

A. No, sir. The measurement was on it.

Q. Do you know how long it was?

A. That is what it said on it; thirty-one feet long.

[fol. 55] Q. You didn't make any measurement of it, did you?

A. No, sir. The measurement is marked on the pipe.

Q. Wasn't it twenty-one feet, instead of thirty-one feet?

A. No, sir.

Q. Now, when you and Myers shouldered this particular joint of pipe you were in front, and walking forward, is that right?

A. I was leading the way, yes, sir.

Q. You say you watched Myers put it on his shoulder and walk around some water?

A. Waited for him to walk around. As he walked out he stepped out in the water a couple of steps. It didn't run over the shoe-tops, but there was a little mud and water at the end of the pipe.

Q. Did you look back any more after you started; you and Myers?

A. After we got straightened out Myers stumbled slightly, and I looked back, and he still had the pipe on his right shoulder.

Q. Then what did you do?

A. Walked on.

Q. Did you look back any more?

A. No, sir.

Q. How do you know that Myers shoved this joint of [fol. 56] pipe from one shoulder to the other?

A. The last time I saw him I looked back and he had it on his right shoulder. After I fell I looked up, and asked him to get it off of me, and he had it in his left arm, and by the sudden jerks of the pipe I could feel that he undoubtedly shifted the pipe.

Q. How far were you from the end of the pipe?

A. I was about six inches. I was as far out on the end as I could get.

Q. How far was Myers from his end of the pipe?

A. Just as close as he could carry it.

Q. You were about thirty feet apart?

A. Yes, sir.

Q. And you say you felt the pipe move on your shoulder?

A. Yes, sir.

Q. And you didn't see Myers move it on his shoulder?

A. I didn't see him change it over his head.

Q. If he had stepped from one side to the other he would have moved the pipe on your shoulder?

A. Yes, sir; also if he moved it from one shoulder to the other.

Q. How do you know whether he moved the pipe from one shoulder to the other, or stepped to one side?

A. By him having it in his left arm.

Q. How do you know he hadn't caught it in his left arm when you fell?

[fol. 57] A. Well——

Q. You fell down, didn't you?

A. Yes, sir.

Q. And you said that his end of the pipe was just on his shoulder; in other words, he wasn't more than six inches from the end of the pipe—which direction did you fall?

A. Side-ways, like that (illustrating).

Q. Did you fall backward or forward?

A. Forward and side-ways.
Q. Forward and to the left?
A. Yes, sir.
Q. Did you fall forward as much as six inches?
A. I fell to the ground.
Q. You fell forward and to the left; did you fall forwards as much as six inches?
A. Practically.
Q. That would have pulled it off his shoulder?
A. No, he was coming towards me.
Q. If you fell faster than he was walking it would have pulled it off of his shoulder?
A. No, sir.
Q. You don't know which shoulder he had it on, do you?
A. I do, yes, sir.
Q. At the time you say you fell?
A. Yes, sir.
[fol. 58] Q. How do you know?
A. I saw him put it on there, and I looked back and he still had it on.
Q. How far had it been, when you looked back, from the place where you fell?
A. It was something like practically ten steps.
Q. About thirty feet?
A. Yes, sir;—a little further, from the hole where I fell.
Q. Did you see this hole?
A. Yes, sir.
Q. How wide did you say it was?
A. About eighteen inches wide.
Q. You were in the act of stepping over it, I believe you say?
A. Yes, sir.
Q. How deep was the hole?
A. Between twelve and eighteen inches deep.
Q. How long was it?
A. Possible five feet; may be longer than that, long.
Q. Did you ever see that hole before the time that you fell?
A. Yes, sir;: I had been over it once or twice.
Q. You had been walking over this same hole before you fell?
A. Yes, sir.

Q. Which foot stepped in the hole?

[fol. 59] A. The left one.

Q. Stepped in the hole with your left foot?

A. Yes, sir.

Q. Which side did you fall on?

A. Right shoulder hit the ground, and my left hip went in the hole—left leg—in the ditch.

Q. You stepped in that hole with your left foot and went down about eighteen inches, is that right?

A. It touched the bottom.

Q. And you fell to the right?

A. To the left.

Q. You fell over to the left, is that right?

A. Yes, sir.

Q. With the piece of pipe on your shoulder?

A. It went straight down; it was on my back when I made the effort to get up.

Q. Now, did the pipe remain on your neck when you fell?

A. No, sir; it was on my back.

Q. Where?

A. On my back.

Q. Didn't you say you fell on your side?

A. No, sir.

Q. Tell us, again, how you fell?

A. My left foot went in the hole, and the pipe on the right shoulder gave me a shove, like that (illustrated), in a twisted position. Had my left foot and leg in the hole, [fol. 60] and the pipe went down on my back, and hit me in the back. I reached down and pulled it up like that. I I could not get it off, laying there in that position, and he (Myers) was standing there laughing, and I asked him to get the pipe off of me.

Q. Do you say that you fell on your side?

A. I fell in a twisted position.

Q. Tell the jury exactly how you fell; did you fall on the side, on the stomach, or on the back?

A. I fell with my foot in the hole, and my arm on the edge of the hole, and my left shoulder in a twisting position, and the pipe fell across my back.

Q. You were lying over on your right side?

A. With my right shoulder—my left hip and my right shoulder was holding me.

Q. Which hip, did you say?

A. My left hip; left side, in other words, was down on the ground. This left leg was against the side of the hole, and this knee was across the ditch, and this shoulder (indicating) was down on the ground; this arm (indicating) under me, like that (illustrating). When I looked up I asked him to get the pipe off.

Q. You were resting on your left hip, and your right hip—did that right hip turn around in front of you? Is that what you tell the jury?

A. Under me.

Q. You were not lying on the ground, you were sitting up on your elbow?

[fol. 61] A. No, sir; I was lying on my elbow, arms, in other words, down under me.

Q. And you say this pipe rested on your back, and not on your shoulder?

A. Yes, sir.

Q. And it stayed there until Myers came around and removed it?

A. No; I pulled it up, myself, with my left arm, and tried to get out from under it, and I could not make it, and I asked him to lift it off of me.

Q. Did you say Doctor White treated you for pyorrhea and lumbago?

A. He said he did. I don't know. I taken his medicine.

Q. How long did he treat you?

A. From the 21st until I called Doctor Henry on the 14th of May.

Q. Doctor Henry treated you first, didn't he?

A. Yes, sir. I called Doctor Slaughter, and they wouldn't have him because Mr. Odin wouldn't recommend it; and they said they had as good a doctor as there was, and the company wouldn't have anything but the best; and they wouldn't make arrangements; and they kept taking me up there, and I had to have some attention.

Q. You said awhile ago, in answer to a question that I asked you, that this suit here in Ouachita county was the first suit that you filed, is that right?

[fol. 62] A. The first suit I had been in.

Q. No, I didn't say that; I didn't ask you that question. I asked you, first, how many suits you had filed, and you said one; and I asked you where that suit was filed, and you said this one in Ouachita county; is that the truth?

A. No, I filed the suit in El Dorado.
Q. Tell the jury what is right, about that?
A. At least an attorney did.
Q. Where did you first file your suit?
A. In Union county; El Dorado court.
Q. Who filed that suit for you?
A. Mr. Spencer.
Q. What became of that suit?
A. Withdrew it.
Q. That suit went to the Federal Court, didn't it?
A. No, sir.
Q. That wasn't removed to the Federal Court?
A. No, sir.
Q. You say that case wasn't removed to the Federal Court?
A. Not that I know of.
Q. Do you know about when it was you filed your first suit; the one in Union County?
A. No, sir; I don't have any idea. He (meaning lawyer) done the filing of it.

[fols. 63-112] Redirect examination.

By Mr. Smead:

Q. With reference to that suit that Mr. Yocum is talking about, Mr. Spencer filed that at El Dorado, and he wasn't representing you at that time?
A. No, sir.
Q. Later you employed me, and that suit was dismissed, and the suit was brought here?
A. Yes, sir.
Q. Nothing was ever done with that suit, except it was dismissed and brought here?
A. Yes, sir.

Recross-examination.

By Mr. Yocum:

Q. Do you know that, there was never anything done except to dismiss the suit in the Union Circuit Court?
A. That is what I asked to be done.

Q. You don't know whether it was taken over to the Federal Court or not?

A. No, sir.

Witness excused.

[fol. 113] R. O. JENKINS, the plaintiff, being recalled for further examination in his own behalf, testified as follows:

Direct examination.

By Mr. Smead:

Q. Jenkins, you testified this morning with reference to the defendant Joe H. Myers shifting his end of the pipe [fol. 114] and jerking it forward and backward. Did he give you any warning of his intention, or of the fact that he was going to shift this pipe, or jerk it?

A. No, sir.

Q. He didn't give you any notice of any kind?

A. No, sir.

Q. Did anybody give you any warning?

A. No, sir.

Q. With reference to stepping over this hole in the ground, was it necessary to step over that hole, in going the way you were going, or not?

A. Yes, sir.

Q. Why was it?

A. Because there was water on each side of the walkway.

Q. It was necessary to step over that, in carrying this pipe?

A. Yes, sir.

Q. Now, I suppose you testified about this: what was it—state again, if you have not already stated it, what was it that caused you to fall?

A. Shifting the pipe, and jerking it, caused me to step in the hole.

Q. Caused you to lose your balance and step in the hole?

A. Yes, sir.

[fol. 115] Cross-examination.

By Judge Yocum:

Q. Did you give Myers any notice you were going to step across this ditch?

A. No, sir.

Q. Why didn't you?

A. I didn't have time.

Q. You saw the ditch before you got to it, didn't you?

A. Yes, sir. I thought he was watching me.

Q. What?

A. I thought he was watching me. He had put me across once.

Q. You didn't give him any warning at all that you had to cross the ditch?

A. No, sir.

Q. You were leading the way, were you not?

A. Yes, sir.

Q. Was this land level where this accident occurred?

A. Well, practically level, all but the hole.

Q. All but what?

A. The hole.

Q. It is down in a creek bottom?

A. Yes, sir.

[fol. 116] Q. You didn't have to walk across that ditch?

A. To stay out of the water, I did.

Q. The ground was level?

A. More or less. It was bottom land; just about level. There was nothing like mounds in there, or anything like that, or hills to walk over.

Q. It was clear; there wasn't anything in your way was there?

A. Nothing more than water.

Q. How deep was the water?

A. Well, I didn't measure it.

Q. Have you got any idea how deep it was?

A. Well, you know, it starts off from small depths, I guess, and gets deeper. I don't know how deep the place was.

Q. How deep did it get out there?

A. I never measured it.

Q. If there was any water there at all it was just a little water on top of the ground?

A. No water where I was walking.

Q. How much space was there where you were walking?

A. The ground we followed set right on a hill, there, more or less.

Q. You had a way to travel of about twelve feet wide that didn't have any water on it?

A. On the little ridge. We come up to this point and it was narrow.

[fol. 117] Q. How wide was it?

A. About ten feet.

Q. How long was the ditch that you stepped in?

A. Ordinary estimate of it; I didn't look at the place very closely, and I haven't been back there since. I don't know exactly how long, but I estimate it to be about five feet.

Q. Then there was five feet there, there was no ditch or water in the way?

A. There was stumps, and soft ground; something like that.

Q. There was no water there, was there?

A. Not where we walked.

Q. Was there any water in this ditch where you stepped in?

A. No, sir.

Q. It was dry?

A. It was dry.

Q. How deep was that?

A. It was every bit of twelve inches.

Q. I thought you said eighteen?

A. Between twelve and eighteen.

Q. How much higher was the ground on which you were walking than the ground farther away where the water was standing?

A. Well, it could have been, possibly, twelve or fourteen inches, or two feet.

Q. In other words, there was a ridge there?

[fol. 118] A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir.

Redirect examination.

Mr. Smead:

Q. How many trips had you and Myers made, carrying the pipe, the same day, before this accident?

A. I had made one trip over the hole, and one back empty. Had a load going over, and wasn't loaded coming back.

Q. You were asked with reference to giving notice; did Myers give you any notice that he was going to shift the pipe?

A. No, sir.

Q. Had you reached the hole at the time he shifted the pipe?

A. I was in the act of going over the hole.

Q. You had reached the edge of the hole, and in the act of stepping over it?

A. Yes, sir; with my left foot.

Witness excused.

[fol. 119] Plaintiff rests.

The defendants, to sustain the issues on their behalf, introduced the following testimony, to-wit:

JOE H. MYERS, one of the defendants, being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. State your name to the jury?

A. Joe H. Myers.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. You know the plaintiff here, R. O. Jenkins?

A. Yes, sir.

Q. Were you working with him on the day, on the 5th [fol. 120] day of April, 1934.

A. Yes, sir.

Q. Where abouts?

A. Fleming Bottoms.

Q. What were you doing?

A. Pipe-lining.

Q. What were you doing with reference to pipe-lining?

A. Were laying pipe.

Q. Laying pipe?

A. Stringing pipe.

Q. Were you carrying any pipe with him?

A. Yes, sir.

Q. What kind of pipe?
A. Two and a half inch up-set tubing.
Q. How long were the joints?
A. About twenty-on or twenty-two feet.
Q. About twenty-one or two feet?
A. Yes, sir.
Q. Do you know what they would weigh?
A. No, sir.
Q. What had you been doing prior to that?
A. Laying pipe.
Q. Laying pipe—what did you do, screw it together?
A. Yes, sir.
Q. And you had gone back to get more pipe, after screwing up what you had laid?
[fol. 121] A. Yes, sir.
Q. How many joints had you and the plaintiff carried across the bottom there when he sustained the injury he alleges he sustained?
A. I don't remember; two or three, I guess.
Q. Now, I wish you would state—he says that you were carrying it on your shoulder, and he on his shoulder, and he was walking in front of you; was that correct?
A. Yes, sir.
Q. Which shoulder did you have the pipe on?
A. My left shoulder.
Q. Did you shift that pipe from your left to your right shoulder?
A. No, sir.
Q. Did you jerk the pipe in any way?
A. Not that I know of.
Q. Well, did you do it; was there anything to cause you to stumble or fall, or make you shift it, or jerk it?
A. No, sir.
Q. Was there anything unusual in the way you carried the pipe?
A. No, sir.
Q. Was there anything in his way, there, to keep him from walking straight ahead?
A. No, sir.
Q. Was that the same way you had carried the other [fol. 122] joints of pipe; you say you had carried two or three?
A. Yes, sir.

Q. And you carried them all down there that way?

A. Yes, sir.

Q. By this same place?

A. Yes, sir.

Q. Was there any hole there where he fell, before he fell?

A. No, sir.

Q. Did you see any hole there as large as he has described in his testimony, five feet long, and eighteen inches wide, and a foot to eighteen inches deep?

A. No, sir.

Q. Was there such a hole there?

A. No, sir.

Q. Tell the jury just what did happen?

A. Well, we were walking along, and the ground gave way with him, and it was about fourteen inches to eighteen inches—(interrupted)

Q. The ground gave way under his feet?

A. Right under his left leg, and he fell over, and the pipe fell on him.

Q. Was the ground soft there?

A. Yes, sir.

Q. And it gave way, and his foot got bogged up that way?

[fol. 123] A. Didn't bog up.

Q. Just gave way, next to a stump?

A. Yes, sir.

Q. Did you go out with the photographer the other day, to have a photograph made of the location?

A. Yes, sir.

Q. Mr. Jamison made the photograph, did he?

A. I didn't know what his name was.

Q. You were there when it was made, were you?

A. Yes, sir.

Q. Is that the photograph that he made (handing witness photograph)?

A. Yes, sir.

Q. Is that a correct photograph of the locality?

A. Yes, sir.

Q. I see that you are standing there in the photograph with your foot on a stump; is that the place where his foot went down in the ground?

A. Yes, sir.

Q. Was there any hole there before his foot went down in the ground?

A. No, sir.

Q. That is, that you could see from the top?

A. Not that I know of.

Q. You had been by there, ha*nd*'t you?

A. Yes, sir.

Q. You say, that you know of; you didn't know of any [fol. 124] hole being there, is that what you mean?

A. Yes, sir.

Q. Is that the stump by which he was passing when his foot went down?

A. Yes, sir.

Q. I see a small depression there; is that the place where it occurred?

A. Yes, sir; right around the stump.

Q. As near as you can locate it?

A. Yes, sir.

Q. When you were out there you put your foot there to show the place?

A. Yes, sir.

Q. And pressed down there to mark it, is that right?

A. Yes, sir.

Q. Is this (handing witness picture) a picture of the same thing, taken out a farther distance across the bottom there?

A. Yes, sir.

Q. Were you carrying the pipe the way he fell, the same way you were facing, at the time he fell?

A. Yes, sir.

Q. Is that (indicating on picture) the pipe line that you were carrying pipe to string?

A. Yes, sir.

Q. It is laying there yet?

[fol. 125] A. Yes, sir.

Judge Marsh: I want to introduce these two photographs in evidence. One is a close-up view, and one is a far off view.

The Court: Is there any objection to the introduction of the pictures?

Mr. Smead: No, we have no objection.

The Court: Let them be introduced.

Note by Reporter: The photographs above mentioned are marked, respectively, Exhibit 1 and Exhibit 2 to Defend-

ants' Testimony, and the same will be found herein immediately following the testimony of this witness.

Judge Marsh (continuing):

Q. When his foot went down in that place what occurred then?

A. He fell.

Q. How did he fall?

A. Fell to his left.

Q. His left foot went down, and he fell to his left; what became of the pipe?

A. Fell on him.

Q. Did you lose hold of your end of the pipe?

A. No, sir.

Q. Did his falling jerk the pipe from your shoulder?

[fol. 126] A. Yes, sir.

Q. Did you catch it?

A. Yes, sir.

Q. How did you catch it?

A. On the elbow.

Q. Caught it in your arms?

A. Yes, sir.

Q. Then what did you do?

A. Laid my end down and went up and took it off of him.

Q. Where abouts was it resting on him?

A. On the right shoulder; he was down.

Q. Across his right shoulder, while he was down?

A. Yes, sir.

Q. He was laying on his left shoulder, I believe you say?

A. Yes, sir.

Q. Then he wasn't laying on his right side?

A. No, sir.

Q. Had he got his foot out of the hole?

A. No, sir.

Q. What did you do after you took the pipe off of him?

A. Nothing.

Q. Did he get up then?

A. No, sir.

Q. Well, did he lay there—continue to lay there?

[fol. 127] A. The best I remember, he laid there a few minutes, and someboy picked him up. I don't know who it was.

Q. Why did he lay there a few minutes?

A. I just didn't pick him up.
Q. Who picked him up, do you remember?
A. No, sir.
Q. What did he do then?
A. Sat down on a log.
Q. How long did he stay there?
A. Just a few minutes.
Q. Where did he go?
A. Started home.
Q. Is that the last time you saw of him?
A. Yes, sir.
Q. Is the log shown in the picture, here, that he was sitting on?
A. It was a bunch of logs. It is not in there.
Q. Next to that bunch of logs?
A. Yes, sir.
Q. Just beyond?
A. Yes, sir.
Q. Is that the last you saw of him, when he went off home?
A. Yes, sir.
Q. How big a hole did his foot make in the ground, there; how big around?
A. About that big around, I guess (indicating about two [fol. 128] feet).
Q. It caved out?
A. Yes, sir.
Q. Was there any water around there close by?
A. I don't know.
Q. I mean, was the water in the way that you had to go by that stump?
A. I don't remember. There was water back up here (indicating on picture).
Q. You will have to show where it is?
A. It was about half-way between where Mr. Odin was standing, and here (indicating).
Q. What do you call that up here (indicating on picture)?
A. The tank.
Q. About half-way between the engine house and where you were standing in the picture, was water?
A. Yes, sir.
Q. Was there any water around where you and him stepped?
A. There was a little water in the holes, there.

Q. In the holes shown in the picture?

A. Yes, sir.

Q. How far would you say it was to the nearest water?

A. I could not say; I don't remember.

[fol. 129] Q. Was that the first day you carried pipe with him?

A. The first I remember of.

Q. Who else was working out there, lining up pipe?

A. There was about three or four more.

Q. Who were they?

A. Tommy Norris, a fellow named Pickett, and Grayson——

Q. Who was your foreman?

A. Jim Forsythe.

Q. And yourself. That composed the crew, did it, with Jenkins?

A. Yes, sir.

Q. Was McGuire there?

A. Yes—no, sir.

Q. McGuire wasn't in your crew?

A. He was in our crew, but they had sent him to another place that day.

Q. Now, how many times had you passed by that stump in carrying that pipe, with this plaintiff?

A. Well, I don't know. Just a joint of pipe, I guess.

Q. Every joint of pipe you had carried that morning you passed by that way, did you?

A. Yes, sir.

Q. You went down by the pipe that was lying there, and you were stringing the pipe the way you were facing in [fol. 130] the picture?

A. Yes, sir.

Q. And you say there was no hole at that stump until he caved—his foot caved in and made one?

A. Yes, sir.

Q. And that is when he fell?

A. Yes, sir.

Q. What caused him to fall?

A. The ground giving way, I guess.

Q. The ground giving way under his foot caused him to fall?

A. Yes, sir.

Cross-examination.

By Mr. Smead:

Q. Mr. Myers, you are still working for the Phillips Petroleum Company?

A. Yes, sir.

Q. What are you doing now?

A. Roustabouting.

Q. Same job you had?

A. No, sir.

Q. Same kind of work you did before?

[fol. 131] A. I am in the pulling crew now.

Q. Promoted, but the same kind of work?

A. Yes, sir; the same.

Q. You are now in the roustabout crew?

A. Yes, sir.

Q. About how big was this hole in the ground, that was caved out after he fell?

A. About that big around (indicating about two feet).

Q. Was it a round hole?

A. Kind of round.

Q. Two or three feet long, and how wide was it?

A. About the same.

Q. Two or three feet around?

A. About two feet.

Q. Pretty good size hole?

A. Yes, sir.

Q. Is that it, right there (indicating on picture)?

A. That is one of them—that is where the hole was.

Q. The hole has been covered up since then?

A. Yes, sir.

Q. That picture doesn't show the hole, except just a little of it?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

[fol. 132] Judge Marsh: That was the hole. We made that as a marker, to show where the hole was.

Mr. Smead (continuing):

Q. This hole here (indicating) is the hole you made the day you took the picture, so it would show where the place was?

A. Yes, sir.

Q. After this accident occurred, when he fell, the company filled up the hole; is that right?

A. Yes, sir.

Q. This land here (indicating on picture)—look at it in this picture; it looks kind of level, but it has little low places, crayfish holes, and things like that?

A. Yes, sir.

Q. This is just typical creek bottom land?

A. Yes, sir.

Q. Wasn't there pools of water on both sides along here (indicating on picture) at various places, all over that bottom?

A. Yes, sir; first one place and another.

Q. Don't you think there — pools of water on each side of the place where Jenkins fell, or, do you remember about it, one way or the other?

A. I don't remember about that.

Q. Which direction—you can get your location by this house; what kind of house is that?

[fol. 133] A. That is a derrick.

Q. About where did you pick up the pipe?

A. Right by the rig.

Q. Where were you carrying it to?

A. Right on the other side of where we were standing.

Q. The picture doesn't show where you were carrying it to?

A. No, sir.

Q. You were walking up this way (indicating on picture)?

A. Yes, sir.

Redirect examination.

By Judge Marsh:

Q. He asked you the question, if the company filled up the hole. Do you know whether the company filled up the hole or not?

A. No, sir; I don't know.

Q. Doesn't the rain fill up holes that are made there?

A. I don't know what filled it.

[fol. 134] Q. You don't know anything about anybody filling it up?

A. No, sir.

Q. You know it wasn't there until his foot caved in there?

A. Yes, sir.

Q. How long did you work around there after that?

A. I worked all day.

Q. You worked around there all day?

A. Yes, sir.

Q. When you got that pipe laid you went elsewhere?

A. Yes, sir.

Q. Was there anyone who worked there all the time?

A. Who me?

Q. No, was there anybody in the employ of the company, or of any other company, who stayed right there all of the time, on that particular lease, or place?

A. Every day?

Q. Yes.

A. Not that I know of.

Q. The rig you see in that picture is one of the pumping rigs?

A. Yes, sir.

Q. That is where you have a well?

A. Yes, sir.

Q. And a pumping unit?

A. Yes, sir.

[fol. 135] Q. Did you help weigh one of these joints of pipe yesterday?

A. Yes, sir.

Q. What did it weigh?

A. A little better than one hundred pounds.

Q. Was that joint of pipe just the same kind of pipe, of the same size and weight as the pipe you were carrying—you and him?

A. I don't know about the weight; it was the same kind of pipe.

Q. Same size, two and a half inch?

A. Yes, sir; up-set.

Q. It was what you had been using for tubing, but it was being then used for line pipe?

A. Yes, sir.

Q. For gas or oil?

A. Yes, sir.

Witness excused.

(Here follow 2 photographs, side folios 135a and 135b)

DEFENDANTS' EXHIBIT NO. 1

135-A

DEFENDANTS' EXHIBIT NO. 2

[fol. 136] JIM FORSYTHE, a witness for the defendants, being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. Your name is Jim Forsythe?
A. Yes, sir.
Q. Your first name is Jim?
A. Yes, sir; Jim.
Q. Where do you live, Mr. Forsythe?
A. I live out from Wichita Falls eighteen miles, on the Morgan and White Lease—Phillips Morgan and White Lease.
Q. You are working for the Phillips Petroleum Company?
A. Yes, sir.
Q. Were you working for the Phillips Petroleum Company on the 5th day of April, 1934?
A. 1934?
Q. Yes.
A. Yes, sir.
Q. Where-abouts—that is the date this alleged injury occurred?
A. I was working on that Flem—Flenniken Lease, down in the bottom.
[fol. 137] Q. What were you doing?
A. We were laying a gas line to the Bilyeu Lease.
Q. What were you using to make a gas line?
A. Mixed pipe; up-set tubing, and plain tubing.
Q. What length joints?
A. The average lengths of the joints were twenty-one feet.
Q. Two and a half inch?
A. No, sir; it was two inch—no, two and a half inch; that is right.
Q. What position did you have there?
A. I was pushing the pipe line gang.
Q. You were foreman?
A. Yes, sir.
Q. Was Mr. Jenkins working there?

A. Yes, sir; he was working there.

Q. Mr. Myers in your crew, too?

A. Joe?

Q. Yes, sir.

A. Yes, sir.

Q. Who else was in your crew there, if you remember?

A. Joe, Tom Norris, Jenkins, and a red-headed fellow—Red Cameron.

Q. Did you see the accident alleged to have occurred there that day to Mr. Jenkins?

A. No, sir; I didn't see it, but I was there directly after it [fol. 138] happened.

Q. Did you see where it did happen?

A. Yes, sir.

Q. What did you see with reference—describe the location?

A. There was a stump setting over here (indicating with hands); pretty large stump; over here (indicating with hand) was another small stump. All I could see there was a small place on the ground, looked like where a fellow was walking and he stepped in loose dirt, and he went in there with his foot. Looked to be about four or five inches deep, where the ground gave way. That is all I could see.

Q. Had you been at that place in your work that day?

A. Yes, sir; we were stringing a line, and we walked all along there.

Q. Was there any hole there when you were stringing the line?

A. I didn't see one.

Q. If it had been one there would you have seen it?

A. Yes, sir; I was all around there.

Q. You walked up and down the line?

A. Yes, sir.

Q. There is defendant's Exhibit No. 1, which is a photograph——

[fol. 139] A. That is mighty plain. That is the line, there (indicating on photograph).

Q. Do you remember that stump that Joe Myers has his foot on, there—the stump?

A. Yes, sir; that is the stump, and this is the little place in the ground, there (indicating on photograph). There is the two stumps; they look like it.

Q. That is where it occurred?

A. Yes, sir.

Q. Had you passed by there before that time?

A. Yes, sir.

Q. The ground around there is all open?

A. Yes, sir. It was a forty acre lease; a big lease; and it was all open around there.

Q. Was it as open when that occurred as it appears in that picture, now?

A. Yes, sir; it was as open then as now.

Judge Marsh: I would like to have the witness come down here and identify this pipe.

The Court: Let them raise it up out there.

Note: Thereupon the pipe was raised up so the witness could see it.

Judge Marsh: (Continuing):

Q. Is that the kind of pipe you were laying?

A. Yes, sir; that is the same size and same kind of pipe.

[fol. 140] Q. Does that look like the same length?

A. Yes, sir; it was the same length.

Q. Did you have any thirty-one foot pipe in your outfit?

A. Thirty-one foot?

Q. Yes.

A. No, sir; we never run across any like that in laying the line. They ordered some extra tubing, that was thirty-one feet, but it was new.

Q. Did you use it out there that day?

A. No, sir; we didn't use that; it was new tubing.

Q. You used the new tubing in the wells, did you?

A. Yes, sir.

Q. And took the old tubing to lay the lines?

A. Yes, sir.

Q. You didn't see them weigh that joint of pipe?

A. No, sir. It weighs around one hundred and ten pounds, though.

Q. That is the average weight?

A. Yes, sir.

Q. One hundred and ten pounds?

A. Yes, sir.

Q. Of course, it will vary acording to how much it is corroded, or been worn by the pumping rods?

A. Yes, sir.

Q. Did you see the plaintiff, Mr. Jenkins, there, after the accident alleged to have occurred?

A. After it happened?

[fol. 141] Q. Yes.

A. Yes, sir.

Q. Where was he?

A. Where was he after it happened?

Q. Yes, sir.

A. I came back from getting some "dope" to go on the pipe, and he was sitting out there on the log.

Q. What do you mean by "dope" to go on the pipe?

A. Grease like that you put on the pipe to make it up, so there will be no grit on the pipe.

Q. You had been to the tool house to get that, and come back, and this occurred while you were gone; is that right?

A. Yes, sir.

Q. Well, did you speak to him?

A. Yes, sir; I asked him what was the matter with him.

Q. What did he say?

A. He said his foot and his side, and his back was hurt.

Q. Did he tell you how it happened?

A. Yes, sir; he said he fell in a hole.

Q. What did he do?

A. What did he do?

Q. Yes.

A. Well, he kept groaning and taking on, and I told some of the boys to take him to the doctor, and one of the boys [fol. 142] taken him in. Pickett taken him in.

Q. They took him to the doctor?

A. Yes, sir.

Q. Doctor Henry, or who?

A. I don't remember; they took him to Doctor Henry, or to El Dorado.

Q. Anyhow, they carried him to the doctor?

A. Yes, sir.

Q. He told you he fell in a hole?

A. Yes, sir.

Q. Did he tell you anything about Myers pushing him in, or jerking the pipe and throwing him in?

A. No, sir; he didn't tell me anything about that.

Q. When was the first time you ever heard him accuse Myers of causing him to fall in the hole?

Mr. Smead: I object to that. He can testify to the conversation, but not just what he heard about it.

The Court: No, that would not be competent.

Judge Marsh: (Continuing):

Q. Did he ever tell you so?

A. No, sir; never told me that Myers pushed him or caused him to fall, either one.

Q. Did he walk off from there?

A. Yes, sir; he walked away, with that fellow leading him; Pickett leading him. But he walked to Pickett's [fol. 143] car.

Q. He got in Pickett's car and went off?

A. Yes, sir.

Q. How long had he been working in your crew?

A. The last time, about five days before he got hurt.

Q. He came to your crew about the first of April?

A. Yes, sir.

Q. Well, had he been hurt before that?

A. Yes, sir; he was pulling—I wasn't working with him when it happened. I will tell you what I heard; I heard he got hurt in the production department, working as roustabout, and there was a pair of elevators fell on his foot.

Q. When he went back to work from that hurt he came to your crew?

A. Yes, sir.

Q. Did he complain any before this?

A. Before he got hurt the last time?

Q. Yes.

A. Yes, sir; complained the day before with his foot, and his side, and his back hurting him, and I put him on the easiest job I had—pounding collars. I offered it to him because he was complaining of his back.

Q. Then, did he complain that day—that morning?

A. The morning that he got hurt?

Q. Yes.

[fol. 144] A. Yes, sir; he was complaining.

Q. What was he complaining of?

A. His foot hurting him, and his side and his back hurting him.

Q. Did he get around actively, or clumsily?

A. It seems to me he was clumsy.

Q. How did he perform his work?

A. Before he got hurt?

Q. Yes. What I mean by that, did he appear to be hurting, from the way he did his work?

A. When he first went to work for me?

Q. Yes.

A. When he first went to work for me he done very good. At that time he was pounding collars, and it seems like he was clumsy with himself.

Q. Well, after he got his foot hurt he came back there and worked five days before he got hurt this time. How did he perform his work then?

A. Pretty poorly; pretty poorly. I would make everything as easy as I could on him because he was complaining.

Q. What did you have him doing that morning?

A. That morning?

Q. Yes.

A. Pounding collars.

Q. Using a hammer—why did you do that?

A. Because he complained of his foot, and his back hurting, and his side also.

[fol. 145] Q. Well, did he do anything else?

A. Yes, sir. I don't know—he wasn't making any success at that, so I put him on the board.

Q. Why did you do that?

A. He wasn't making any success at pounding collars.

Q. What I mean is this: What is the board, and what did it have to do in pipe-lining?

A. You put the board down on the ground, a board to hold the pipe steady while they hit it with the hammer.

Q. Is that a hard job?

A. No, sir; that is very easy.

Q. How came him doing this pipe work—carrying the pipe?

A. They didn't have nothing else much to do until the pipe was strung; I was gone after this "dope," and I told them to finish stringing the pipe while I was gone; and they strung six or seven joints, and I come back, and they were all setting down, and I asked them what was the matter, and they says he got hurt.

Q. If I get you right—see if I am not right. You had connected up the pipe you had out there, while he was pounding collars and holding the board, and you put them to stringing while you went to get the "dope"?

A. Yes, sir.

Q. Stringing means, putting the pipe out there and laying it down in position to be screwed together?

A. Yes, sir.

Q. That is what they call stringing?

[fol. 146] A. Yes, sir.

Q. And he and the rest of the crew went to putting pipe out there, what you call stringing it?

A. Yes, sir.

Q. And this happened while you were gone?

A. Yes, sir.

Q. Did you have him cleaning threads on some of the collars?

A. Yes, sir; I had him cleaning some threads to-.

Q. Did you have a conversation with him that day about some one else getting hurt?

A. He was telling me about a fellow that used to work for Macmillan, a great big fellow, and he said that he had been on the donation list for quite a while, two years, and it looked like that would be a pretty good thing.

Q. Did he say whether the fellow was hurt or not?

A. Well, he didn't say.

Q. What did you say to him about it?

A. I told him I wouldn't care to draw very much money like that.

Q. What did he say about it?

A. I believe that was about all that was said at that time.

Q. When did this conversation occur, with reference to this accident?

A. It was a day before the accident.

Q. The day before?

[fol. 147] A. Yes, sir.

Q. Did that occur in connection with this complaint about his back, side and foot?

A. Sir.

Q. Did that occur in the same conversation when he was complaining to you the day before of his back hurting him, and his foot hurting him?

A. Yes, sir.

Cross-examination.

By Mr. Smead:

Q. Mr. Forsythe, you were the foreman?

A. Yes, sir.

Q. How long have you been with the Phillips Petroleum Company?

A. Been working about four years, the last time; going on four years.

Q. Who did you work for before that?

A. I worked for them about three years.

Q. Who did you work for before that?

A. Before I went to work for the Phillips Petroleum Company?

Q. Yes.

A. I worked for the Magnolia, and also the Lion Oil [fol. 148] Company.

Q. Didn't you get hurt while you were working for the Magnolia, yourself?

A. Why, I liked to have got burned up.

Q. You had a suit against the Magnolia?

A. Not exactly.

Q. You worked for them, and you worked for the Lion—before the Magnolia or afterwards?

A. I worked for the Magnolia last.

Q. And the Lion before that?

A. Yes, sir.

Q. How long have you been in the field, in the Smackover district?

A. Ever since the Smackover boom.

Q. You worked for these three companies?

A. Yes, sir.

Q. And are still working for the Phillips Petroleum Company?

A. Yes, sir.

Q. Are you still foreman?

A. No, sir; I am pumping at the present time.

Q. This string of pipe shown in the picture there, didn't you change the pipe, the location of it, after Jenkins got hurt?

A. Did we change the location?

Q. Didn't you find you had the string crooked, or something like that?

[fol. 149] A. (Hesitating.)

Q. The way it is there, that is not the same as it was there on the day of the accident?

A. We changed the location of it; we were following the slough, and we changed the line, and decided not to follow the slough.

Q. The way it is shown in this picture is not the same it was on the day of the accident?

A. We changed it some.

Q. How do you know the stump here is the same?

A. That had been laid; that part of it; and we changed our place where we were going.

Q. Changed it to somewhere else?

A. Yes, sir.

Q. You are sure this is the right site?

A. Yes, sir; I know that.

Q. How long after Jenkins fell do you think it was before you got there?

A. Well, it could not have been very long. I asked some of the boys, and they said twenty-five or thirty-five minutes.

Q. You found him there sitting on a log?

A. Yes, sir.

Q. And you asked him what was the matter?

A. Yes, sir.

Q. You testified he didn't say anything about Myers jerking the pipe, or throwing him in the hole; you didn't [fol. 150] ask anything about that, did you Mr. Forsythe?

A. Joe told me that; Joe told me he had fell.

Q. I understand about him falling in the hole. You said there was nothing said about Joe Myers shoving him in the hole?

A. There was nothing said about it.

Q. You didn't stop and ask him all of the details—Jenkins was suffering pretty bad at the time, wasn't he?

A. Seemed to be.

Q. You didn't go into details how it happened; you said you found out he fell in the hole?

A. Yes, sir.

Q. There was no occasion for him telling you that Joe Myers shoved him in the hole?

A. They didn't tell me anything about that; nothing was said about it.

Q. Jenkins didn't tell you that before he left?

A. No, sir.

Q. He was groaning pretty bad?

A. He was groaning some, yes, sir.

Q. You say, the day before that Jenkins was complaining about his back hurting?

A. Yes, sir.

Q. And you gave him an easy job?

A. Yes, sir.

Q. Didn't all of the men working around there alternate in using the hammer?

[fol. 151] A. No, sir; you have to have a regular collar pounder. You have to keep in turn with the hammer and the hooks.

Q. You call that an easy job?

A. It is not like heading the hooks.

Q. How come Jenkins to be carrying pipe if there was something the matter with his back?

A. I told them to string the pipe and they—all of the men, and they did it to suit themselves while I was gone.

Q. You didn't think there was anything the matter with his back, or you would not have him stringing pipe; isn't it a fact if Jenkins had been on the job, complaining that way, he wouldn't have stayed on there very long, if there was anything the matter with his back—would he?

A. He commenced complaining to me, and I says, "if you are hurting why don't you go in and stay".

Redirect examination.

By Judge Marsh:

Q. What did he say to that?

A. Well, he said, "they will work me a little while and can me anyhow.

Q. What?

[fol. 152] A. They will work me a little while and can me anyhow.

Q. What did he mean by that?

A. Well, there are several meanings to it.

Recross-examination.

By Mr. Smead:

Q. If he wasn't able to do the work they would can him pretty quick, wouldn't they?

A. The company pays you good and they expect you to work.

Q. If you cannot do the work they don't want you?

A. Yes, sir.

Redirect examination.

By Judge Marsh:

Q. That is the rule with every company?

A. Yes, sir.

Witness excused.

[fol. 153] WILL MCGUIRE, a witness for the defendants, being first duly sworn that the testimony he should give in this case should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. What is your name?

A. Will McGuire.

Q. Where do you live?

A. I live in Smackover.

Q. What do you do?

A. Work for the Phillips Petroleum Company.

Q. What is your job?

A. General—well, the laborer, I guess.

Q. Working in the roustabout gang?

A. Yes, sir.

Q. Do you know R. O. Jenkins?

A. I do.

Q. Did he work with you out there?

A. For a while, yes, sir.

Q. Were you in the crew the day he had the accident?

A. In the morning that he got hurt I wasn't. I worked with that same crew in the afternoon.

Q. Had you worked with that crew the day before?

[fol. 154] A. Yes, sir.

Q. Was he in the crew the day before?

A. Yes, sir.

Q. What were you doing then?
A. We were connecting pipe, and laying pipe line.
Q. At that lease, or another one?
A. At another one.
Q. Did you have any conversation with him that day?
A. Yes, sir.
Q. What was it?
A. Well, he was talking to us about hurting him.
Q. Had he had an accident to his foot before that——
A. Yes, sir.
Q. —That you know of?
A. Yes, sir.
Q. How long had he been back at work after getting over that?
A. As well as I remember, about four or five days.
Q. Did he complain of anything else hurting him?
A. Said his foot and hip.
Q. His foot and hip?
A. Yes, sir.
Q. Did he get about actively, or clumsily?
A. He was clumsy.
Q. Did his movements indicate that he wasn't feeling well?
A. Apparently so, yes, sir.
[fol. 155] Q. You haven't worked with him since the accident?
A. No, sir.
Q. You are still working for the company, are you?
A. Yes, sir.

Cross-examination.

By Mr. Smead:

Q. What are you doing for the Phillips Petroleum Company, Mr. McGuire—I didn't understand?
A. Roustabouting.
Q. Still working for them?
A. Yes, sir.

Redirect examination.

By Judge Marsh:

Q. Were you working where this pipe was laid when he got hurt?

A. Yes, sir; in the afternoon.

Q. You hadn't worked there before?

A. No, sir.

Q. Did anyone show you the place where it was supposed [fol. 156] to have occurred?

A. They didn't show me any hole, no, sir.

Q. Did you examine the place?

A. Well, I was up and down the line, working on the line.

Q. Was there any such a thing as a hole there, five feet long, and eighteen inches wide, and a foot to eighteen inches deep?

A. No, sir; not that I saw.

Q. Was there any such a thing up and down that line anywhere?

A. No such thing as that.

Q. Did you see a hole there by the stump where his foot was said to have gone in?

A. I never noticed any hole at all.

Q. You didn't look for it?

A. No, sir.

Recross-examination.

By Mr. Smead:

Q. Mr. McGuire, how long would it take a gang of men to lay a pipe line like that across the field there?

A. Well, we got across the field that day.

[fol. 157] Q. At it all one day?

A. I put in a half day on it.

Q. What I mean, they didn't work around there several days; they put that stuff down and got away to somewhere else?

A. They move along with the line.

Q. That territory where this happened, there was no reason why you would remember very much about it?

A. I come right by the pipe line, right from where they began laying it.

Q. You would not remember any particular thing about it; they lay it fast and go on and do something else?

A. What was that.

Q. Were you there after Jenkins was hurt?

A. Yes, sir; afterwards.

Q. How long afterwards?

A. I could not say—about one O'clock.

Q. You didn't come up to see about him being hurt?

A. No, sir; I come from work.

Q. You were working; you were not paying any attention to Jenkins getting hurt?

A. No, sir.

Q. You didn't expect him to get hurt?

A. No, sir.

Q. And you didn't inspect the place where he fell?

A. No, sir.

Q. You were working?

A. Yes, sir.

[fol. 158] Q. Judge Marsh asked you about this hole not being there; this was just a creek bottom, place?

A. It was what you termed a bottom.

Q. All sorts of hole[illegible]tumps, and everything else in there?

A. I didn't notice any holes.

Q. You didn't notice any; you were not paying any attention to them?

A. I am always watching for holes when I am working.

Witness excused.

THOS. H. NORRIS, JR., a witness for the defendants, being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. State your name to the jury?

[fol. 159] A. Thomas H. Norris, Jr.

Q. Where do you live?

A. El Dorado.

Q. What do you do?

A. Work for the Phillips Petroleum Company.

Q. Were you working with the Phillips Petroleum Company on the Flemming Lease on the 5th of April, 1934—this last April?

A. Yes, sir.

Q. Do you know R. O. Jenkins?

A. Only by sight.

Q. Did you see him at work there that day?

A. Yes, sir.

Q. Did you work there in the crew with him?

A. Yes, sir.

Q. The same crew he was in?

A. Yes, sir.

Q. What were you doing?

A. Carrying pipe across a flat there, along side of the slough.

Q. Who was your partner carrying pipe?

A. Well, I don't recollect who that was. I think it was Grayson, though.

Q. You think it was Grayson?

A. Yes, sir.

Q. Just whoever happened to be at the other end of the pipe when you picked up, you went on with?

[fol. 160] A. Yes, sir.

Q. You didn't pair off partners?

A. No, sir.

Q. Did you see Mr. Jenkins fall there, at a stump, near that pipe line that day?

A. No, sir.

Q. What did you see, if anything, with reference to the accident?

A. I saw him right after he had fallen. He was bent over, sitting down on a log.

Q. Did you see where he had fallen?

A. Yes, sir.

Q. Did you go out there and look at it?

A. Yes, sir.

Q. What did you see there?

A. Just a place there on the ground about the size of a foot, where the ground had caved, or gave way.

Q. Was it a new, fresh place?

A. Yes, sir.

Q. How deep was it?

A. About a foot, I should think.

Q. Looked to be freshly made?

A. Yes, sir.

Q. Was that in the regular path you went up and down, the regular way you went up and down carrying that pipe, when you were stringing it?

A. Yes, sir.

Q. Had you been by that place before?

[fol. 161] A. Yes, sir.

Q. How many times had you been by it that morning?

A. Several times; I don't know the exact number.

Q. Look at that (handing witness photograph) and see if you recognize the place in the picture?

A. Yes, sir; there it is, right there (pointing out on picture).

Q. Is that the same stump that you referred to?

A. I could not positively identify the stump, but it was by the side of a stump.

Q. You recognize it as the place?

A. Yes, sir.

Q. Was there any hole there before this time you went and looked at it, after you saw him on the log, sitting on the log, leaning over?

A. No, sir.

Q. Was there any such a thing there as a hole anything like five feet long, and eighteen inches wide, and a foot deep?

A. No, sir.

Q. How big was this hole; how big was the one you saw there after the accident?

A. About the size of his foot.

Q. Just where the ground had given way and his foot gone down?

A. Yes, sir.

Q. You don't know which foot it was?

A. No, sir.

[fol. 162] Q. It was close to the s-ump?

A. Yes, sir.

Q. Did you talk to him after the accident, or not?

A. No, sir.

Q. What kind of pipe were you using, or stringing there?

A. Two and a half inch tub ng.

Q. Just like that, there (indicating joint of pipe in the court room)?

A. Yes, sir.

Q. What was the length of it?

A. It will average around twenty-one feet.
Q. Did you help weigh that pipe yesterday?
A. Yes, sir.
Q. That joint?
A. Yes, sir.
Q. What did it weigh?
A. Not quite one hundred and two pounds.
Q. Between one hundred and one, and one hundred and two pounds?
A. Yes, sir.
Q. Did you have any thirty-one foot pipe to carry that day?
A. No, sir.
Q. Or any other time, stringing out there in the pipe line?
A. No, sir.

[fol. 163] Cross-examination.

By Mr. Smead:

Q. Mr. Norris, you didn't see Jenkins fall?
A. No, sir.
Q. You don't know what kind of pipe he was carrying, except to know what you were stringing; you know what you carried, but you don't know what he was carrying?
A. All of the pipe was the same length, approximately—all two and a half inch up-set tubing.
Q. You don't know that, do you Mr. Norris?
A. Yes, sir.
Q. How do you know it?
A. It was all hauled up and piled up by the truck, and the tubing run the same length.
Q. How long was it?
A. About twenty-one feet.

Redirect examination.

By Judge Marsh:

Q. They hauled the pipe out there and you all were toting from the same pile?
A. Yes, sir.

Witness excused.

[fol. 164] C. M. Odin, a witness for the defendants, being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. State your name to the jury?
A. C. M. Odin.
Q. What is your position with the Phillips Petroleum Company?
A. I am production superintendent for the Arkansas District.
Q. You live at Smackover, do you?
A. Yes, sir.
Q. You were not out there the day of the accident?
A. Yes, sir.
Q. You didn't see any of it?
A. No, sir.
Q. Do you know who was in the gang?
A. Yes.
Q. Who?
A. Jim Forsythe was gang-pusher—I will qualify that, this way: I know he was supposed to be out there, and I checked the foreman's time sheet, and it showed he was there.
[fol. 165] Q. I will give it to you this way: Was a Mr. Grayson in the gang?
A. Yes, sir.
Q. Do you know where he is?
A. He is somewhere in Oklahoma.
Q. You have tried to locate him, have you?
A. Yes, sir.
Q. Could you locate him?
A. I hadn't located him, up until last night. We have got the superintendents in Oklahoma, and they are trying to locate him now.
Q. So far, you don't know whether he is located or not?
A. No, sir.
Q. Is Mr. Pickett in Oklahoma too?
A. Yes, sir; he is somewhere in Oklahoma.
Q. You haven't been able to get in touch with him?

A. No, sir; not so far.

Q. Have all of the rest of the crew that was working there at the time of this alleged injury testified here today?

A. Yes, sir.

Q. Working out there at the time of the accident?

A. Yes, sir.

Cross-examination.

[fols. 166-234] By Mr. Smead:

Q. I didn't understand you—was there a man named Pickett out there?

A. Yes, sir.

Q. Where did you say he was?

A. He is supposed to be in Oklahoma?

Q. And Grayson is supposed to be in Oklahoma?

A. Yes, sir. That is where they gave their address on the report card.

Witness excused.

[fol. 235] C. M. Odin, a witness for the defendants, being recalled for further examination by the defendants, testified as follows:

Direct examination.

By Judge Marsh:

Q. The plaintiff stated yesterday that you kept calling for him to take him to the doctor's office. Did you take him to the doctor's office, and how many times?

A. I don't know how many times, but Doctor Henry had been treating his case, and I got a phone call in the office one morning from a man named Green, I believe it was; called me over the telephone, and he says——

Mr. Smead: Don't state what he said—oh, go ahead.

Judge Marsh (Continuing):

Q. What did you do?

A. He called up and said that Jenkins was in bad shape, and wanted to change doctors; so I went over to see him

a few times, and had my district foreman to call on him. And so I went out and called Doctor White. Doctor White examined him before. And he decided he should go to the hospital; so he spent eight or ten days in the hospital; and [fol. 236] Doctor White thought he was able to go back home. Jenkins said he didn't have a way to get in and out to the doctor's office, and I says, "well, either myself, or one of my foremen, will take you to and from the doctor's office." I made several trips over there, and I think I had some of the other boys go, along the latter part, I would say about the middle of May. I think I made a trip or two, I don't remember. Anyhow, I left word with the district foreman to see that Jenkins had transportation to and from the doctor's office, and he made a trip or two over there, and he didn't locate Jenkins, and I sent another man over there, and I made a trip myself, and could not locate him; and we contacted his wife, and he was out of town, for the time being. Doctor White said his case was progressing satisfactorily, and it wasn't necessary to bring him back every day; and, like that day was Wednesday, he said he would see him Friday or Saturday, "whatever is convenient for you boys."

Q. Did he sue the company in the Union Circuit Court, at El Dorado?

A. Yes, sir.

Q. Had he brought suit against the company while you were carrying him to and from the doctor's office?

A. Yes, sir.

Q. Do you remember the date of the suit?

A. No, sir. It was some time along pretty close to the middle of May, though.

[fol. 237] Q. Look at that summons; that is the summons that was issued?

Mr. Smead: There is no dispute about that.

Judge Marsh: The 17th of May is when he brought the suit.

Judge Marsh (Continuing):

Q. After that you didn't take him any more, after he filed the suit?

A. No, sir.

Judge Marsh: I want to introduce this summons.

The Court: Let it be introduced.

Note by reporter: The summons mentioned above is marked Exhibit A to the testimony of C. M. Odin, and a copy of same will be found herein immediately following the testimony of this witness.

Judge Marsh: For the purpose of showing the date of the suit.

Cross-examination.

By Mr. Smead:

Q. The suit was dismissed down there, that was brought?
A. I understood it was.

[fol. 238] Q. Now, at the time that Jenkins was being brought to Doctor White didn't Jenkins tell you that he thought he should be taken to a specialist?
A. He kicked about all the doctors we took him to.
Q. And you took him to Doctor White?
A. Yes, sir.
Q. And you told him that Doctor White was the Company Doctor?
A. Yes, sir; I did.

Witness excused.

EXHIBIT A TO TESTIMONY OF C. M. ODIN

IN THE CIRCUIT COURT OF UNION COUNTY, ARKANSAS, SECOND DIVISION

No. 6164

R. O. JENKINS, Plaintiff,

vs.

PHILLIPS PETROLEUM CO., Defendant.

Summons

State of Arkansas, To the Sheriff of Union County, Arkansas, Greeting:

[fol. 239] You are commanded to summon Phillips Petroleum Co., to answer in twenty days after the service of this

summons upon them a complaint filed against them in the Circuit Court of Union County, Arkansas, Second Division thereof, and warn them that upon their failure to answer said complaint that same will be taken for confessed; and you will make due return of this summons on the first day that said Court is in session after twenty days after the date of the issuance hereof.

Witness my hand and the seal of said Court, this 17th day of May, 1934.

H. R. F. Goode, Clerk, by —— ——, D. C. (Seal.)

STATE OF ARKANSAS,
County of ——, ss:

On the — day of ——, 193—, I have duly served the within writ by delivering a copy, and stating the substance thereof to the within named —— as I am hereby commanded.

—— ——, Sheriff, by —— ——, Deputy.

[fol. 240] No. 6164

Summons

Union Circuit Court, Second Division

R. O. Jenkins, Plaintiff,

vs.

Phillips Petroleum Co., Defendant

Sheriff's Fees

Service	$.....
Mileage	$.....
Returns	$.....
Total	$.....

J. V. Spencer, Attorneys.

June 16, 1934.

(Endorsed in ink on face of Summons): Dismissed, June 16, 1934, in vacation.

[fol. 241] M. T. KIRK, a witness for the defendants, being first duly sworn, testified as follows:

Direct examination.

By Judge Marsh:

Q. State your name to the jury?
A. M. T. Kirk.
Q. Are you connected with the Phillips Petroleum Company?
A. I am, yes, sir.
Q. What is your employment, or position?
A. My title is Special Agent. I work in various departments. My special work is claim work.
Q. You are in the claim department?
A. Yes, sir; among others.
Q. Mr. Kirk, is the Phillips Petroleum Company protected by any liability or casualty insurance in this case?
A. Not in the state of Arkansas.
Q. There is no insurance in this case?
A. No, sir.

Cross-examination.

[fol. 242] By Mr. Smead:

Q. You have insurance, but it doesn't cover this case?
A. We have insurance for the employees; $500.00 insurance for each six months the employee has been with the company.
Q. This company doesn't need insurance; what is the reason; because they don't need it.
A. I don't know.

Witness excused.

[fols. 243 & 244] Defendants rests.

The plaintiff, to further sustain the issues on his behalf, introduced the following testimony, in rebuttal, to-wit:

[fol. 245] R. O. JENKINS, the plaintiff, being recalled for testimony in rebuttal, testified as follows:

Direct examination.

By Mr. Smead:

Q. Your name is R. O. Jenkins, and you are the plaintiff in this case?

A. Yes, sir.

Q. Mr. Jenkins, Jim Forsythe testified that you complained to him the day before you claim to have been hurt there, of your foot and your back, and also Will McGuire testified that you said, the day before, that your foot and hip were hurting?

A. I don't know Mr. McGuire.

Q. Did you make that statement to anybody?

A. No, sir; I did not make any such statement.

Q. Mr. Jim Forsythe testified you had a conversation with him the day before, about a man getting a pension at the Macmillan Company; did you say anything like that?

A. No, sir; I didn't have any such a conversation.

No cross-examination.

Witness excused.

[fol. 246] Notation by Reporter

At this stage of the trial Mr. Smead, counsel for plaintiff, requested the court to permit the jury to pick up the joint of pipe in the court room, and which was discussed in the testimony, which request was granted by the court, and, thereupon, several members of the jury did pick up the pipe in question.

Thereupon, Mr. Smead, counsel for plaintiff, requested permission of the court to recall the plaintiff, R. O. Jenkins, for further examination, and there being no objection by the defendants, said request was granted, and the plaintiff recalled.

R. O. Jenkins, the plaintiff, being recalled for further examination, on his own behalf, testified as follows, to-wit:

Direct examination.

By Mr. Smead:

Q. Your name is R. O. Jenkins?

A. Yes, sir.

Q. You are the plaintiff in this case?
[fol. 247] A. ——.
Q. Have you worked any since you received your injury?
A. Not at all.
Q. Have you been able to perform any work since that time?
A. None at all.

No cross-examination.

Witness excused.

Plaintiff rests.
Defendants rest.

The above and foregoing was all of the testimony adduced on the trial of this cause.

[fol. 248] DEFENDANTS' MOTIONS FOR DIRECTED VERDICT

Thereupon, the defendant Phillips Petroleum Company, at the close of all of the testimony in the case, moved the court to instruct the jury to return a verdict in its favor, and submitted to the court its written instruction in support of its said motion, in words as follows, to-wit:

Defendant's Instruction No. 1

(Refused.)

"You are instructed to return a verdict for the defendant, Phillips Petroleum Co."

But the court overruled said defendant's motion for a directed verdict in its favor, and refused to give to the jury said defendant's requested written instruction numbered 1, set out above, and failed and refused to instruct the jury to return a verdict in favor of the defendant Phillips Petroleum Company. To which actions, rulings and orders of the court, the defendant Phillips Petroleum Company at the time and in proper manner, separately and severally saved its exceptions; which separate and several exceptions were then and there duly noted of record.

Thereupon, the defendant Joe H. Myers, at the close of [fol. 249] all of the testimony in the case, moved the court to instruct the jury to return a verdict in his favor, and

submitted to the court his written instruction in support of his said motion, in words as follows, to-wit:

Defendant's Instruction No. 2

(Refused.)

"You are instructed to return a verdict for the defendant, Myers."

But the court overruled said defendant's motion for a directed verdict in his favor, and refused to give to the jury said defendant's requested written instruction numbered 2, set out above, and failed and refused to instruct the jury to return a verdict in favor of the defendant Joe H. Myers. To which actions, rulings and orders of the court, the defendant Joe H. Myers at the time and in proper manner, separately and severally saved his exceptions; which separate and several exceptions were then and there duly noted of record.

Oral Instructions by the Court

"Gentlemen of the jury, the court will now give you the [fol. 250] instructions in the case, which you will take and consider as a whole, and when the instructions given you are considered together and as a whole, they will constitute the law by which you will be governed in making up your verdict.

The burden is upon the plaintiff to establish the allegations of his complaint by a preponderance or greater weight of evidence. By a preponderance of the evidence is meant, by a greater weight of the testimony.

The burden is upon the defendant to establish the defenses of contributory negligence and assumed risk, unless that is shown by the evidence on the part of the plaintiff.

Plaintiff's Requested Instructions, Given

Thereupon the Court, over the separate and several objections of the defendants, and each of them, separately and severally, gave to the jury plaintiff's requested written instructions respectively numbered 1 and 2, in words and figures as follows, to-wit:

[fol. 251] Plaintiff's Instruction No. 1

(Given.)

You are instructed that if you find from a preponderance of the evidence that plaintiff and defendant, Joe H. Myers, in the performance of their duties as employees of the defendant, Phillips Petroleum Company, were carrying a joint of pipe as alleged in the complaint, the front end of said pipe resting on plaintiff's shoulder and the rear end of said pipe resting on the shoulder of the defendant, Joe H. Myers; and you further find from a preponderance of the evidence that the defendant, Joe H. Myers, without warning, shifted said pipe from one shoulder to the other and jerked said pipe; and you further find that said shifting and jerking of said pipe without warning constituted negligence; and you further find from a preponderance of the evidence that as the direct result of such negligence on the part of Joe H. Myers in so shifting and jerking said pipe without warning, plaintiff lost his balance and fell and was injured; and you further find that plaintiff was at the time in the exercise of ordinary care for his own safety, and had not assumed the risk, then you will find for the plaintiff and against both of the defendants.

[fol. 252] Plaintiff's Instruction No. 2

(Given.)

You are instructed that if you find for the plaintiff your verdict will be for such an amount of damages as you find from a preponderance of the evidence in this case will reasonably compensate the plaintiff for all physical pain and mental anguish suffered or endured by him on account of the injuries complained of, if any; also, any further physical pain and mental anguish which the evidence may show with reasonable certainty the plaintiff will suffer and endure on account of the injuries sustained by him, if any; also, any pecuniary loss heretofore suffered by the plaintiff on account of the injuries complained of, if any; and also such sum as will reasonably compensate the plaintiff for any damages which the evidence may show with reasonable certainty he will suffer in the future on account of diminished capacity for earning money, if any; provided, however, if you find that the plaintiff was himself guilty of

negligence contributing to his injury, then you will find for the defendant, Joe H. Myers, and, as to the defendant, Phillips Petroleum Company, you will diminish the plaintiff's damages, if you find he is entitled to recover, in proportion to the amount of negligence found by you to be attributable to the plaintiff.

[fol. 253] To which actions and rulings of the court, separately and severally, in giving to the jury plaintiff's requested written instructions respectively numbered 1 and 2, set out above, the defendants, and each of them, at the time and in proper manner duly saved their separate and several exceptions, which exceptions were then and there duly noted of record.

DEFENDANTS' REQUESTED INSTRUCTIONS, GIVEN

Thereupon, the Court gave to the jury defendant's requested written instructions respectively numbered 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, in words and figures as follows, to-wit:

No. 3

(Given.)

There is only one allegation of negligence in the complaint, and that is, that the defendant Myers carelessly and negligently shifted the end of the pipe which he was carrying from one shoulder to the other, and carelessly, negligently and violently jerked on the piece of pipe which he and the plaintiff were carrying.

In considering whether the defendants were negligent, the jury will be confined to the one allegation of negligence.

[fol. 254] No. 4

(Given.)

Negligence is the failure to do what a man of ordinary prudence would do under like or similar circumstances, or the doing of something that a man of ordinary prudence would not do under like or similar circumstances.

No. 5

(Given.)

You are instructed that the burden of proof is upon the plaintiff in this case, to show by a preponderance of the

evidence that the defendant Myers carelessly and negligently shifted the end of the pipe which he was carrying from one shoulder to the other shoulder, and carelessly, negligently and violently jerked, or pulled, on the pipe. If the evidence of the defendants on the question of negligence outweighs the evidence offered by the plaintiff, or if the evidence of the parties is equally balanced, it will be the duty of the jury to return a verdict for the defendants.

No. 6

(Given.)

You are instructed that there is no presumption of negligence arising in this case, and if you find that the plain-
[fol. 255] tiff was injured, such in itself would not be sufficient to entitle the plaintiff to recover.

There is a presumption of law that the defendants were not negligent, and the burden is upon the plaintiff to overcome the presumption.

No. 7

(Given.)

You are instructed that a servant assumes all of the risks and hazards incident to the employment which he undertakes. He assumes all risks which are open and obvious, regardless of whether he knows of them. He also assumes all risk of which he has knowledge and appreciates the danger arising therefrom.

No. 8

(Given.)

If you believe and find from the evidence that the defendant Myers did not carelessly and negligently shift his end of the pipe from one shoulder to the other, and did not carelessly, negligently and violently jerk on the joint of pipe which he and the plaintiff were carrying, it will be your duty to return a verdict for the defendant.

[fol. 256] No. 9

(Given.)

The plaintiff and the defendant Myers were carrying a joint of pipe which was to be used in the construction of a pipe line. Under the evidence in the case, it was not the

duty of the defendants, or either of them, to have cleared or prepared a way for plaintiff to walk at the place where he alleges he was injured, and neither was it the duty of the defendants, or either of them, to have directed the plaintiff as to where he should walk in carrying the pipe. The plaintiff was walking forward and ahead of the defendant Myers, and it was solely his duty to select the path or ground on which he would walk at the place where he alleges he fell.

No. 10

(Given.)

If you believe from the evidence that as the plaintiff and the defendant Myers were carrying the piece of pipe, the plaintiff came to a place where the ground was not firm and secure, and that when the plaintiff stepped thereon, it gave way with him, permitting his foot to sink into the soil and causing him to lose his balance and fall, then the court instructs you that the defendants would not be liable unto the plaintiff for any injury or injuries which he may have sustained in such manner.

[fol. 257]

No. 11

(Given.)

If you believe, from the evidence, that the plaintiff did not exercise reasonable care in selecting a place to walk and, because thereof, stepped on or against some object, or into a hole in the ground, which caused him to trip and fall, and you further find that such was the sole and proximate cause of any injury which he may have received, it will be your duty to return a verdict for the defendant.

No. 12

(Given.)

If the plaintiff took an awkward step or was careless and negligent in failing to look where he walked, and such was the sole and proximate cause of any injury which he may have sustained, he cannot recover.

ORAL INSTRUCTIONS OF THE COURT

Thereupon, the court, of its own motion, orally instructed the jury as follows:

[fol. 258] Gentlemen of the jury, you are further instructed that you are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the weight to be attached to the testimony of any of the witnesses testifying in the case you may take into consideration their manner and demeanor while on the witness stand; any bias or prejudice, if any shown; any interest, if any, in the result of your verdict for or against either party; any conflicts or contradictions which may arise in the testimony of any of the witnesses, which may arise in their own testimony, or which may arise when compared with the testimony of other witnesses testifying in the case; their knowledge and means of knowing the facts about which they have testified; the reasonableness or unreasonableness of the testimony of any of the witnesses; and in the observance of these rules you will apply your own common knowledge of men, and the motives of men, in affairs, and find the truth, and present that in your verdict.

Thereupon, after the closing arguments of counsel the court instructed the jury as to the forms of verdict which could be returned by it in this case, as follows, to-wit:

Gentlemen of the jury, if you find for the plaintiff in this case, as against both of the defendants, the form of your [fol. 259] verdict will be, "We the jury find for the plaintiff and against the defendant Phillips Petroleum Company and the defendant Joe H. Myers, and assess his damages" in such sum as you believe from the evidence he is entitled to recover.

If you find for the plaintiff, but only against one defendant, then the form of your verdict will be, "We the jury find for the plaintiff, against", whichever defendant you find is liable, naming such defendant, in such sum as you believe from the evidence he is entitled to recover.

If you find in favor of the defendants, then the form of your verdict will be, "We the jury find for the defendants".

If your verdict is unanimous, one of the members of the jury will sign it as foreman. If the verdict is not unanimous, but is agreed to by as many as nine, but less than twelve, then all agreeing to the verdict will sign it. Whatever the verdict may be, write it out on a piece of paper and return it into open court. You may retire now to consider of your verdict.

[fol. 259a] Thereupon, and before consideration by the jury of a verdict, the hour of five o'clock p. m. having arrived, court was adjourned until nine o'clock of the following day, with the following directions to the jury:

Gentlemen of the jury, during the recess of the court you will be permitted to separate, but don't discuss the case among yourselves, and don't permit anybody to discuss it with you. All of the evidence has been introduced, the law has been given to you by the court, and the case argued and submitted to you for your consideration in arriving at a verdict. You have heard everything about the case that is to hear; the only thing remaining for you is, to deliberate and arrive at your verdict. Until you do reach a verdict don't deliberate on the case, except when you are here together in the jury room. During the time of the recess of the court don't talk together about the case and don't allow anybody to discuss it or say anything about it in your presence or hearing. Do not do any deliberating or talking among yourselves. While you are away and separated leave everything about the case off; don't read anything in the papers about it, and don't say anything about it until you come back in the jury room. You may go until nine o'clock tomorrow morning.

Thereupon at nine o'clock of the morning of the 29th day of September, 1934, the jury retired to the jury room to consider of their verdict, and later, and on the same day, returned into open court the following verdict, to-wit:

VERDICT

"We the jury find for the plaintiff against the defendants Phillips Petroleum Co. and Joe H. Myers and assess the plaintiff's damages at $50,000.00.

J. W. Harrell, Foreman."

[fol. 259b] ORDER APPROVING BILL OF EXCEPTIONS

Wherefore, on this the 22 day of February, 1935, the foregoing bill of exceptions is presented to the Honorable W. A. Speer, the regular Judge of the Ouachita Circuit Court, Second Division, in the Thirteenth Judicial Circuit of Arkansas, presiding during all said proceedings, and is

by him examined and found to be a correct, true and complete record thereof and is by him approved as such and ordered to be filed as a part of the record of said cause.

Witness my hand as such Judge on this the 22 day of February, 1935.

(Signed) W. A. Speer, Judge of the Ouachita Circuit Court, Second Division, in the Thirteenth Judicial Circuit of Arkansas.

O. K.
J. V. Spencer, for Pltff. Marsh & Marsh, Mahony & Yocum, for Deft.

[fol. 259c] Reporter's Certificate to foregoing transcript omitted in printing.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 260 & 261] Supersedeas Bond on Appeal omitted in printing.

[fol. 262] IN SUPREME COURT OF ARKANSAS

JUDGMENT—May 6, 1935

This cause came on to be heard upon the transcript of the record of the circuit court of Ouachita county, Second division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause, except in this: The verdict and judgment for fifty thousand dollars as damages is excessive; but this error may be cured by modifying and reducing the amount of the judgment, down to thirty thousand dollars.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, modified so as to reduce the amount of the judgment in favor of the appellee to thirty thousand dol-

lars, and that said appellee recover of said appellant and United States Fidelity and Guaranty Company, surety in the supersedeas bond filed in this cause, the said sum of thirty thousand dollars, with interest at six per cent per annum from the 29 day of September, A. D. 1934, the amount of judgment of said circuit court as so reduced; also that said appellee recover of said appellant and said surety all his costs in said circuit court in this cause expended, and have execution thereof.

It is further considered that said appellant recover of said appellee all its costs in this Court in this cause expended, and have execution thereof.

Opinion by Butler, J.; Smith, McHaney and Baker, JJ., dissent.

[fol. 263] IN SUPREME COURT OF ARKANSAS

PHILLIPS PETROLEUM COMPANY

v.

JENKINS

OPINION—May 6, 1935

BUTLER, J.

The plaintiff, R. O. Jenkins, brought suit in the Union Circuit Court against the defendants, Joe H. Myers and the Phillips Petroleum Company for damages for personal injuries. He alleged that he and Joe H. Myers were employed by the Phillips Petroleum Company and that, while acting in the line of duty and performing work for the company, he was injured on account of the negligence of the said Myers who was assisting him; that Myers was a resident of Union County, Arkansas, and that Phillips Petroleum Company is a foreign corporation. Damages were laid in the sum of $75,000.

In apt time the Petroleum Company filed its petition for removal of the cause to the Federal Court. This petition was overruled and, subsequently, the company filed an amended petition which was also overruled and denied. The original and amended petitions, while not denying that Joe H. Myers was in the employ of the Petroleum Company and assisting plaintiff in his work at the time of his

injury, alleged that the charges of negligence against the defendant, all being specifically repeated, were "wrongfully and fraudulently made for the purpose of defeating the jurisdiction of the United States District Court for the Western District of Arkansas, El Dorado Division." It was further alleged that "plaintiff and the defendant, Joe H. Myers, are residents and citizens of the State of Arkansas, and this defendant, Phillips Petroleum Company, is a resident and citizen of the State of Delaware, and the defendant, Joe H. Myers, is wrongfully and fraudulently made a party defendant in this action for the purpose of preventing a removal of this case by the defendant, Phil-[fol. 264] lips Petroleum Company, from the court in which it was filed to the District Court of the United States for the Western District of Arkansas, El Dorado Division, and this cause involves a separable controversy."

The petition for removal falls squarely within the rule announced in Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U. S. 146, and C. R. I. & P. Ry. Co. v. Whiteaker, 239 U. S. 421. "It is not enough", said the court in the last case cited, "to assert that there was a fraudulent joinder of defendants, but there must be 'a statement of facts rightfully engendering that conclusion', and that 'merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice; the showing must be such as compels the conclusion that the joinder is without right and made in bad faith.' And 'it is not such', it was said, 'unless it was without any reasonable basis.'" The trial court, therefore, properly denied the petition for removal.

Thereafter, the Petroleum Company filed its separate answer denying the allegations of negligence in the complaint and pleading, as an affirmative defense, that plaintiff assumed the risks of his employment. Joe H. Myers also answered, adopting the separate answer of the Petroleum Company as his own. The case proceeded to trial upon the issues joined and the evidence adduced. There was a verdict and judgment in favor of plaintiff in the sum of $50,000, from which is this appeal.

The Petroleum Company, in its motion for a new trial, filed approximately sixty-four days after the return of the verdict, raised the question of the constitutionality of Sec. 7137 of Crawford & Moses' Digest upon which the liability

[fol. 265] of the Petroleum Company is predicated. This section abrogates the fellow servant law insofar as it applies to corporations and creates liability as to them for injury to employees caused by negligence of fellow servants. The contention that said act is unconstitutional is one of the grounds urged for a reversal of the judgment. It is the contention of the appellee that this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea. We pass this contention for the reason that this court, in numerous decisions for a period of more than twenty-five years, has upheld the constitutionality of section 7137, supra, the latest expression being in the case of Postal Tel. Cable Co. v. White, Law Rep., Vol. 56, p. 291, Ms. Op.

At the conclusion of the testimony the defendant moved for a directed verdict on the ground that there was no substantial evidence to sustain the allegation of the complaint as to the negligence of Joe H. Myers. This is the main ground urged for reversal.

The evidence relative to the circumstances out of which the negligence of Joe H. Myers is said to have arisen is in sharp and irreconcilable conflict. That adduced on behalf of the plaintiff tends to establish the following facts: on the date of the injury, plaintiff and Joe H. Myers, his fellow servant, were engaged in carrying sections of 2½" pipe from 31 to 32 feet long of an estimated weight of 250 pounds, plaintiff carrying the front end on his right shoulder and Myers carrying the rear end on his right shoulder. The territory where this work was being done was low and swampy with a good many stumps, and it was necessary for them to walk carefully to avoid the soft [fol. 266] ground, stumps and water. They had used the route over which they were carrying the pipe at the time of the accident in carrying other pipe, either that day or a few days before. A depression was in the way about five feet long and eighteen inches deep and wide. As plaintiff was in the act of stepping across this depression he felt a forward jerk of the pipe on his shoulder immediately followed by a backward movement of the pipe causing him to lose his balance and to fall into the hole or ditch, his end of the pipe falling upon him. When he fell he looked back and saw Myers holding the pipe in the crook of his

left arm. From the movement of the pipe on plaintiff's shoulder and its situation when he looked back after he fell he stated that the jerks he experienced which caused him to fall were occasioned by Myers in attempting to change the pipe from his right to his left shoulder; that this was done with no notice or warning to plaintiff. Myers testified that there was no hole or ditch in the path along which they were walking and that he was not carrying the pipe on his right, but on his left shoulder, and that he did not move or jerk the pipe as they were walking along. He said plaintiff's fall was occasioned because the earth gave away under plaintiff's foot; that there was no hole until the ground caved in when plaintiff stepped upon it; that this made a pretty good sized hole—about two feet around.

It is first argued that the sudden jerk of pipe, alleged by plaintiff to have caused the accident, was caused not by any movement of the same on the part of Myers, but because of the unevenness of the path, making it necessary at times to take either longer or shorter steps to avoid pools of water, stumps, etc. This argument, however, is not based upon any evidence. Myers did not so testify, but, on the contrary, stated that there was no unusual movement or [fol. 267] shifting of the pipe at all and that the plaintiff's fall was occasioned solely because of the ground caving in under his foot-steps.

It is next insisted that as plaintiff's back was toward Myers so that he could not actually see what movement of the pipe Myers made, if any, (which fact he admitted) his statement that Myers shifted the load from his right to his left shoulder was a mere supposition and therefore there was no evidence to justify the conclusion that the pipe was shifted in the manner stated by plaintiff. We are of the opinion, however, judging from the movement of the pipe as described by plaintiff and its situation immediately after he had fallen that the inference is justified that there was some unusual movement of the pipe made by Myers as he was carrying his end that a shift of the load from one shoulder to the other would probably have occasioned the jerks felt by the plaintiff. The jury were doubtless men experienced in the ordinary affairs of life and from the facts related as to the movement of the pipe on plaintiff's shoulder could fairly deduce the cause thereof and reach the conclusion that plaintiff's theory was correct.

It is next contended that even though Myers might have shifted the pipe, as contended by plaintiff, this would not constitute negligence. This, we think, was a question for the jury. The unevenness of the pathway and the difficulty of progress might lead to the reasonable inference that it was the duty of Myers, in the exercise of ordinary care for the safety of his fellow workman, to give some warning of his intention to change the position of the pipe. We are unwilling, therefore, to say that there was no substantial evidence tending to support the verdict of the jury.

[fol. 268] It is lastly contended that the verdict and judgment based thereon is excessive. To this we agree. Plaintiff was twenty-eight years old at the time of his injury, with a life expectancy of thirty-seven years under normal conditions. He was earning approximately twenty dollars a week. In estimating the present value of his future earnings, appellee assumed that he would have continued to earn through the remainder of his life an amount equal to his earning capacity at the time of his injury which it was also assumed was much more than he was actually earning because of economic conditions. Based on these assumptions, we are presented with a calculation which with damages for his pain and suffering, would justify the amount of the verdict. It is appellee's contention, which is supported by some testimony, that his fall resulted in injury to his spine and serious impairment of his nervous system, causing the sphincter muscles to become flaccid; that because of this he is unable to control the movements of his bowels and kidneys which will finally result in complete paralysis. If appellee's physical condition is as he contends, it is hardly to be presumed that he will live through his normal life expectancy, but, as we view the testimony, the progress and duration of his physical disabilities is more or less conjectural and there is but little evidence to show that these disabilities would be accompanied by much physical suffering. With regard to his earning capacity, it may be said that he is a common laborer with but little expectation that his earning capacity would increase with the years; rather, it is more likely that it will diminish. It is a matter of common knowledge that a man's capacity for manual labor decreases with age and when past fifty his services are not in demand.

We have been cited by both appellant and appellee, to [fol. 269] many cases where the amount of judgment allowed or reduced is thought to sustain their respective contentions. These cases, however, are but little authority, as each case, with respect to the amount of judgment, must rest upon its own peculiar facts. In the case at bar, it is our conclusion that the amount awarded is excessive and that the judgment should be reduced to the sum of $30,000. It is, therefore, ordered that the judgment of the lower court be modified to the extent mentioned and, as modified, it is affirmed.

Smith, McHaney and Baker, JJ. dissent.

[fol. 270] IN SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—June 10, 1935

Being fully advised, the petitions for rehearing in the following causes are by the Court severally overruled, viz:

* * * * * * *

No. 3830

PHILLIPS PETROLEUM COMPANY

v.

R. O. JENKINS

* * * * * * *

[fol. 271] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS TO THE SUPREME COURT OF THE UNITED STATES—Filed June 26, 1935

To the Chief Justice of the Supreme Court of the State of Arkansas:

Phillips Petroleum Company, a corporation, and United States Fidelity & Guaranty Company, a corporation, respectfully show:

1. Petitioners are the appellants in the above entitled cause.

2. The above named appellee filed a complaint in the Circuit Court of Ouachita County, State of Arkansas, on June 16, 1934, against Phillips Petroleum Company, a corporation, and Joe H. Myers, for damages on account of an injury alleged to have been sustained by the appellee as a result of negligence of Joe H. Myers, an employee of Phillips Petroleum Company, while the said appellee and Joe H. Myers were engaged in the performance of their duties as employees of Phillips Petroleum Company; and judgment was rendered in said cause in favor of said appellee for the sum of Fifty Thousand Dollars ($50,000.00).

3. An appeal from said judgment was taken to the Supreme Court of the State of Arkansas, where said judgment was modified by reducing the damages to Thirty Thousand Dollars ($30,000.00) and affirmed by said Supreme Court on the 6th day of May, 1935, and, thereafter, your petitioner applied for a rehearing which was denied by said Supreme Court on the 10th day of June, 1935. The judgment of the Circuit Court of Ouachita County as against Phillips Petroleum Company only was superseded by a bond executed by United States Fidelity and Guaranty [fol. 272] Company, a corporation, as surety. Judgment was entered by the Supreme Court of Arkansas against both Phillips Petroleum Company and United States Fidelity & Guaranty Company on May 6, 1935.

4. In said cause there was drawn in question the validity of a statute of the State of Arkansas on the ground of its being repugnant to the Constitution of the United States, in that Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, in so far as it abrogates the common law fellow-servant rule as to all corporations of every kind and character, was alleged to deny to appellant Phillips Petroleum Company, a corporation, the equal protection of the law and to deprive it of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; and the decision was in favor of its validity.

5. Petitioners further state that Joe H. Myers has been duly notified of the intention of petitioners to appeal from

the judgment and decision of the Supreme Court of Arkansas to the Supreme Court of the United States and has been requested to join in said appeal or to indicate that he refuses to do so, and that the said Joe H. Myers has refused to join in said appeal and has consented that petitioners may appeal from said judgment without joining him therein, as shown by the original notice hereto attached.

Petitioners further show that the constitutional question involved in this appeal affects only your petitioners and is not available to the appellant Joe H. Myers inasmuch as the statute attacked purports to make petitioner Phillips Petroleum Company liable for the acts of negligence of its employee, Joe H. Myers, to a fellow-servant.

Wherefore, petitioners pray for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of the State of Arkansas against petitioner to the Supreme Court of the United States in order that the decision and judgment of said court may be examined and reversed; and further pray that a transcript of the record, proceedings, and papers in this cause, duly authenticated [fol. 273] by the Clerk of the Supreme Court of the State of Arkansas, may be sent to the Supreme Court of the United States, as provided by law. Petitioners further pray that they be granted the right to appeal without joining Joe H. Myers therein. Petitioners, desiring the appeal to be a supersedeas, pray an order touching the security to be required of them and the approval of such bond as required in this case.

The errors upon which your petitioners claim to be entitled to an appeal are those above indicated and more fully set out in the assignment of errors filed herewith.

Dated this 21st day of June, 1935.

Marsh & Marsh, Mahony & Yocum, of El Dorado, Arkansas; R. H. Hudson, R. L. Foster, of Bartlesville, Oklahoma, Attorneys for Petitioners-Appellants.

[File endorsement omitted.]

[fol. 274] IN SUPREME COURT OF ARKANSAS

[Title omitted]

NOTICE OF APPEAL—Filed June 26, 1935

To Joe H. Myers:

You will please take notice that on the 6th day of May, 1935, judgment was entered in the above entitled action by the Supreme Court of Arkansas, modifying the judgment of the Ouachita Circuit Court, Second Division, by reducing the amount of recovery to Thirty Thousand Dollars ($30,000.00) and affirming said judgment as modified, and adjudging that appellee recover of Phillips Petroleum Company and Joe H. Myers and United States Fidelity & Guaranty Company, surety on the supersedeas bond given by Phillips Petroleum Company, the sum of Thirty Thousand Dollars ($30,000.00) and costs.

You are hereby notified that Phillips Petroleum Company and United States Fidelity & Guaranty Company intend to appeal from the judgment and decision of the Supreme Court of Arkansas to the Supreme Court of the United States and hereby request you to join in said appeal or to indicate that you refuse to do so.

Dated this 21st day of June, 1935.

Phillips Petroleum Company and United States Fidelity & Guaranty Company, by R. L. Foster, Their Attorney.

[File endorsement omitted.]

[fol. 275] I hereby acknowledge service of the above notice at Little Rock, Arkansas, on this 21st day of June, 1935, and I hereby refuse to join in the appeal from the judgment mentioned therein, and consent that Phillips Petroleum Company and/or United States Fidelity & Guaranty Company may appeal from said judgment without joining me therein.

Joe H. Myers.

Witnesses: C. M. Oden, Neill C. Marsh.

[File endorsement omitted.]

[fol. 276] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Phillips Petroleum Company, a corporation, and United States Fidelity & Guaranty Company, a corporation, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Arkansas, and the assignment of errors filed therewith, and the record of said cause having been considered, it is

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Arkansas, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Arkansas prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States.

It is further ordered that said appellants give good and sufficient security in the sum of Thirty-six Thousand Dollars ($36,000.00); that said appellants shall prosecute said appeal to effect and, if said appellants fail to make good their plea, they shall answer all damages and costs.

The said appellants now presenting a bond in the sum of Thirty-six Thousand Dollars ($36,000.00) with Aetna Casualty & Surety Company as surety thereon, it is ordered that the same be and is hereby approved.

It is further ordered that the appeal shall operate as a supersedeas.

[fol. 277] It appearing that Joe H. Myers, co-appellant in the above cause, has been duly notified by Phillips Petroleum Company and United States Fidelity & Guaranty Company of their intention to appeal from the judgment of the Supreme Court of Arkansas to the Supreme Court of the United States and have requested said Joe H. Myers to join in said appeal or to indicate his refusal to do so; and it further appearing that the said Joe H. Myers has refused to join in said appeal and has consented that Phillips Petroleum Company and United States Fidelity & Guaranty Company may appeal without joining him therein, it is hereby ordered that a severance be granted

and that the Phillips Petroleum Company, a corporation, and United States Fidelity & Guaranty Company, a corporation, have the right to appeal without joining J. H. Myers in said appeal.

Dated this 24th day of June, 1935.

C. E. Johnson, Chief Justice of the Supreme Court of the State of Arkansas.

[fol. 278] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 26, 1935

In support of their petition for appeal, petitioners assign the following errors in the record and proceedings in this cause (The term "appellant" refers to Phillips Petroleum Company):

1. The Supreme Court of Arkansas erred in holding that appellant's request for a peremptory instruction was properly refused by the trial court. The liability of appellant was based solely upon the alleged negligence of a co-employee and fellow-servant of appellee. Appellant was not and is not a railroad company nor engaged in the mining of coal, and would not have been liable under the law of Arkansas but for that portion of Section 7137, Crawford & Moses Digest of the Statutes of Arkansas which provides that "all corporations of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant or employee. Said portion of the statute is unconstitutional and void for the following reasons:

(a) It deprives appellant of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily discriminates against corporations by creating a liability of corporations to their employees for injuries sustained as the result of negligence of a fellow-servant, leaving individual and partnership employers engaged in [fol. 279] the same business free of liability to their employees for injuries sustained under the same circum-

stances. The Supreme Court of Arkansas erred in refusing to so hold;

(b) It deprives appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily makes the fact of incorporation the basis of liability of employers for injuries to their employees resulting from negligence of co-employees and fellow-servants. The Supreme Court of Arkansas erred in refusing to so hold.

2. The Supreme Court of Arkansas erred in holding that the trial court properly gave to the jury Instruction No. 1, as follows:

"You are instructed that if you find from a preponderance of the evidence that plaintiff and defendant, Joe H. Myers, in the performance of their duties as employees of the defendant, Phillips Petroleum Company, were carrying a joint of pipe as alleged in the complaint, the front end of said pipe resting on plaintiff's shoulder and the rear end of said pipe resting on the shoulder of the defendant, Joe H. Myers, and you further find from a preponderance of the evidence that the defendant, Joe H. Myers, without warning, shifted said pipe from one shoulder to the other and jerked said pipe, and you further find that said shifting and jerking of said pipe without warning, constituted negligence, and you further find from a preponderance of the evidence that as the direct result of such negligence on the part of Joe H. Myers in so shifting and jerking said pipe without warning, plaintiff lost his balance and fell and was injured; and you further find that plaintiff was at the time in the exercise of ordinary care for his own safety, and had not assumed the risk, then you will find for the plaintiff and against both of the defendants."

Said instruction, in so far as it authorizes a verdict against appellant, was erroneous in that it made appellant liable in damages for an injury to the appellee as the result of negligence of a co-employee and fellow-servant and was based upon Section 7137, Crawford & Moses Digest of the Statutes of Arkansas. Appellant was not and is not a railroad company nor engaged in the mining of coal and is not liable under the laws of Arkansas for injuries sustained by an employee as the result of negligence of a co-

employee or fellow-servant, except for that portion of Sec- [fol. 280] tion 7137, Crawford & Moses Digest of the Statutes of Arkansas which provides that "all corporation- of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant or employee. Said portion of the statute is unconstitutional and void for the following reasons:

(a) It deprives appellant of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily discriminates against corporations by creating a liability of corporations to their employees for injuries sustained as the result of negligence of a fellow-servant, leaving individual and partnership employers engaged in the same business free of liability to their employees for injuries sustained under the same circumstances. The Supreme Court of Arkansas erred in refusing to so hold;

(b) It deprives appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily makes the fact of incorporation the basis of liability of employers for injuries to their employees resulting from negligence of co-employees and fellow-servants. The Supreme Court of Arkansas erred in refusing to so hold.

Prayer for Reversal

For which errors petitioners pray that the said judgment of the Supreme Court of the State of Arkansas in the above entitled cause, dated May 6, 1935, be reversed and a judgment rendered in favor of said petitioners.

Dated this 21st day of June, 1935.

Marsh & Marsh, Mahony & Yocum, of El Dorado, Arkansas; R. H. Hudson, R. L. Foster, of Bartlesville, Oklahoma, Attorneys for Petitioner-Appellant.

[File endorsement omitted.]

[fols. 281 & 282] Supersedeas bond on appeal for $36,000.00 approved and filed June 26, 1935, omitted in printing.

[fols. 283 & 284] Citation in usual form showing service on R. O. Jenkins filed June 26, 1935, omitted in printing.

[fol. 285] Return to Allowance of Appeal omitted in printing.

[fol. 286] Certificate of Lodgment omitted in printing.

[fol. 287] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 288] IN SUPREME COURT OF ARKANSAS

ORDER ENLARGING TIME TO FILE TRANSCRIPT—Filed July 15, 1935

Upon motion of counsel for appellants, and for good cause shown,

It is hereby ordered that the time for filing the record in the Supreme Court of the United States is hereby enlarged and extended to the 1st day of September, 1935.

It is further ordered that this order be filed with the Clerk of the Supreme Court of the United States.

Dated this 10th day of July, 1935.

C. E. Johnson, Chief Justice of the Supreme Court of Arkansas.

[fol. 288½] [File endorsement omitted.]

[fol. 289] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 21, 1935

Come now Phillips Petroleum Company and United States Fidelity & Guaranty Company, the appellants in the above entitled cause, and adopt their assignment of errors as their statement of the points to be relied upon, and state that the following portion of the record as filed is necessary for the consideration of the case, to wit:

The entire record as filed, except:

The testimony of Dr. J. B. Jamison (R. 64 to 91A, inclusive; 243 to 244, inclusive);

The testimony of Dr. Leslie A. Purifoy (R. 92 to 104, inclusive);

The testimony of Dr. R. B. Robbins (R. 105 to 112, inclusive);

The testimony of Dr. David Levine and exhibits identified by him (R. 166 to 186 H, inclusive);

The testimony of Dr. D. E. White (R. 187 to 206, inclusive, and 242, 243);

The testimony of Dr. George B. Fletcher (R. 207 to middle of page 223, inclusive);

[fol. 290] The testimony of Dr. F. O. Mahony (R. 223 to 234, inclusive).

The testimony of the above named witnesses relates solely to the extent of the injuries to appellee and is not deemed material for the consideration of the questions to be presented to this court and may therefore be omitted from the printed record. All other portions of the record should be printed.

Dated this 7th day of August, 1935.

Marsh & Marsh, Mahony & Yocum, Rayburn L. Foster, Counsel for Appellants.

Acceptance of Service and Stipulation

Service of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed is acknowledged to have been made upon appellee on this 9th day of August, 1935.

It is stipulated and agreed by appellee that the portion of the record as filed to be excluded from the printed record, according to appellants' designation, relates solely to the extent of the injuries to appellee and has no bearing upon the questions raised by appellants' assignment of errors.

This stipulation shall not preclude either party from hereafter applying to the court for an order directing the clerk to print additional portions of the record, and shall [fol. 291] not preclude the court or counsel, with the approval of the court, from referring to portions of the rec-

ord not printed if deemed necessary during the course of the argument, or otherwise during the disposition of the cause.

Dated this 9th day of August, 1935.

L. B. Smead, J. H. Spencer, Robert C. Knox, Counsel for Appellee.

[fol. 292] [File endorsement omitted.]

Endorsed on cover: File No. 39,940. Arkansas Supreme Court. Term No. 386. Phillips Petroleum Company, a Corporation, and United States Fidelity & Guaranty Company, Appellants, vs. R. O. Jenkins. Filed August 21, 1935. Term No. 386, O. T. 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY, COMPANY, A CORPORATION,

Appellants,

vs.

R. O. JENKINS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

MARSH & MARSH,
MAHONY & YOCUM,
R. H. HUDSON,
R. L. FOSTER,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY, COMPANY, A CORPORATION,

Appellants,

vs.

R. O. JENKINS.

Appellee.

STATEMENT OF BASIS OF JURISDICTION OF THE UNITED STATES SUPREME COURT TO REVIEW JUDGMENT OF THE SUPREME COURT OF ARKANSAS UPON APPEAL.

Pursuant to United States Supreme Court Rule 12, Paragraph 1, the above appellants file this statement showing the basis on which the appellants contend that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein, as

follows (the term "appellant" has reference to Phillips Petroleum Company):

1. The statutory provisions believed to sustain the jurisdiction are:

Sec. 237 (a) of the Judicial Code (Title 28 U. S. C. A., Sec. 344 (a), which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

An Act approved January 31, 1928, Chap. 14, Sec. 1, 70th Congress, 45 U. S. Statutes at Large, page 54 (Title 28 U. S. C. A., Sec. 861 a), which provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

2. The statute of the State of Arkansas, the validity of which is involved, is Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, reading as follows:

> "Hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or which may

result from the carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

Only that portion of the above statute applicable to "all corporations of every kind and character" is involved, the appellant not being a railroad company or engaged in the mining of coal.

3. The judgment of the Supreme Court of Arkansas upholding the validity of the above mentioned portion of said statute was rendered on the 6th day of May, 1935, and appellant's petition for rehearing was overruled on the 10th day of June, 1935. The petition for appeal was presented on the 24th day of June, 1935.

4. The action was one at law for the recovery of damages for personal injuries alleged to have been sustained by appellee as the result of negligence of Joe H. Myers while both appellee and Myers were employed by and were engaged in the performance of their duties for appellant. Appellee and Myers were engaged in carrying a joint of pipe, appellee carrying the front end and Myers walking behind him carrying the rear end. Myers is alleged to have shifted the pipe from one shoulder to the other, causing a jerk which broke appellee's stride and caused him to step in a hole in the ground and fall. Both men were working under the direction of Jim Forsythe, foreman, and were fellow-servants (see Complaint and Bill of Exceptions, page 13). The court, over the objection and exception of appellant, gave to the jury "plaintiff's Instruction No. 1" (Bill of Exceptions, page 240), instructing the jury in substance

that if Myers was negligent as alleged and appellee was injured thereby, the appellant was liable.

The appellant requested the court to direct a verdict in its favor, which request was refused. (Bill of Exceptions, page 237).

In its motion for new trial, filed in the trial court, which serves as assignment of errors in the Supreme Court of Arkansas, appellant set up the following errors (Bill of Exceptions, page 253):

> "Eighth: The court erred in refusing to give in charge to the jury this defendant's requested written instruction numbered 1, to wit:
>
> " 'You are instructed to return a verdict for the defendant, Phillips Petroleum Company.'
>
> To which refusal of the court to give said instruction to the jury the defendant, Phillips Petroleum Company, at the time excepted and asked that its exceptions be noted of record.
>
> "The error of the court in refusing to give said instruction was in this, to wit: The only negligence alleged in the complaint was that of the individual defendant, Joe H. Myers, who was a fellow-servant of the plaintiff, and the evidence offered in the trial of the case tended to prove negligence only on the part of said defendant and the plaintiff. Under these facts, it clearly appeared that if the plaintiff was injured as alleged in his complaint, it was because of negligence on the part of himself and/or said individual defendant, and contributory negligence on his part and/or the negligence of his fellow-servant, Joe H. Myers, was a good and complete defense to the plaintiff's cause of action, and Sections 7137 and 7145 of Crawford & Moses Digest of the Statutes of Arkansas, which purport to deprive this defendant of said defenses, are unconstitutional and void, in that they violate and con-

travene Section 1 of Article 14 of the Constitution of the United States of America in the respects hereinafter alleged.

"Ninth: The court erred in giving in charge to the jury, over the objections of this defendant, plaintiff's requested instruction numbered 1, to wit: [quoting the instruction, which, for the sake of brevity is omitted herein]. To the ruling of the court in giving said instruction defendant excepted and asked its exceptions be noted of record.

"That said instruction is misleading and erroneous in this, to wit: That it makes this defendant respond in damages for an act of its servant resulting in injury to his fellow-servant and is based on Sec. 7137 of Crawford & Moses Digest of the Laws of Arkansas, and that same is invalid as violating the Fourteenth Amendment to the Constitution of the United States, Sec. 1, in that this defendant, a corporation, is a citizen and that it is denied equal protection of the laws in its property rights with other citizens of Arkansas who are individuals, in that said law (Sec. 7137 C. & M. Digest) attempts to make it respond in damages to its servant for the negligence of a fellow-servant, but does not impose upon individuals employing servants the duty to respond in damages to a servant for the negligent act of a fellow-servant, and that it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine."

The motion for new trial was considered by the trial court and overruled (Bill of Exceptions, page 258); and the constitutionality of said statute was considered by the Supreme Court and the validity thereof upheld in the following language:

"The Petroleum Company, in its motion for a new trial, filed approximately sixty-four days after the re-

turn of the verdict, raised the question of the constitutionality of Sec. 7137 of Crawford & Moses' Digest upon which the liability of the Petroleum Company is predicated. This section abrogates the fellow-servant law in so far as it applies to corporations and creates liability as to them for injury to employees caused by negligence of fellow servants. The contention that said act is unconstitutional is one of the grounds urged for a reversal of the judgment. It is the contention of the appellee that this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea. We pass this contention for the reason that this Court, in numerous decisions for a period of more than twenty-five years, has upheld the constitutionality of Section 7137, *supra,* the latest expression being in the case of *Postal Tel. Cable Co.* v. *White,* Law. Rep., Vol. 56, p. 291, Ms. Op."

The fact that the Supreme Court of Arkansas passed upon the validity of the statute and upheld it gives the United States Supreme Court jurisdiction on appeal whether or not the question was properly and timely raised in the lower court.

Rothschild v. *Knight,* 184 U. S. 334, 46 L. Ed. 573;

San Jose Land & Water Co. v. *San Jose Ranch Co.,* 189 U. S. 177, 47 L. Ed. 765;

Manley v. *Park,* 187 U. S. 547, 47 L. Ed. 296;

Home Insurance Co. v. *Dick,* 281 U. S. 397, 74 L. Ed. 926;

Abie State Bank v. *Bryan,* 282 U. S. 765, 75 L. Ed. 690.

Plaintiff's complaint and evidence and the court's instructions were based upon the above statute. The exception to plaintiff's Instruction No. 1, the request for a

peremptory instruction, and the motion for new trial were sufficient to challenge the constitutionality of said statute.

People of New York v. *Zimmerman,* 278 U. S. 63, 73 L. Ed. 184, 62 A. L. R. 785;

International Harvester Co. of America v. *Missouri,* 234 U. S. 199, 58 L. Ed. 1276;

National Mutual Building & Loan Assn. of New York v. *Brahan,* 193 U. S. 635, 48 L. Ed. 823;

Murray v. *Charleston,* 96 U. S. 432, 24 L. Ed. 760;

Scott v. *Eaton,* 15 Wall. 380, 21 L. Ed. 72;

Murdock v. *Mayor of Memphis,* 20 Wall. 590, 22 L. Ed. 429, 441;

Satterlee v. *Matthewson,* 2 Peters 380, 7 L. Ed. 458, 468;

Crowell v. *Randell,* 10 Peters 368, 9 L. Ed. 458;

Craig v. *Missouri,* 4 Peters 410, 7 L. Ed. 903;

Wilson v. *Black Bird Creek Marsh Co.,* 2 Peters 245, 7 L. Ed. 412.

For reversal of the judgment of the Supreme Court of Arkansas, appellant relies upon the following cases:

Gulf C. & S. F. R. Co. v. *Ellis,* 165 U. S. 150, 41 L. Ed. 666;

Cotting v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 46 L. Ed. 92;

Kentucky Finance Corporation v. *Paramount Auto Exchange Corporation,* 262 U. S. 544, 67 L. Ed. 1112;

Power Mfg. Co. v. *Saunders,* 274 U. S. 490, 71 L. Ed. 1165;

Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389, 72 L. Ed. 927;

Frost v. *Corporation Commission of Oklahoma,* 278 U. S. 516, 73 L. Ed. 483;

Ballard v. *Mississippi Cotton Oil Co.,* 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476;

Bedford Quarries Co. v. *Bough,* 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418;
Chicago, M. & St. P. R. Co. v. *Westby,* 178 Fed. 619 (8 C. C. A.).

Dated the 21st day of June, 1935.

Respectfully submitted,

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No. 386

In the Supreme Court of the United States

October Term, 1934.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

vs.

R. O. JENKINS, *Appellee.*

Brief of Appellants in Opposition to Motion to Dismiss or Affirm.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1934.

No. .....

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

vs.

R. O. JENKINS, *Appellee.*

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Decision Below.

This is an appeal from the decision of the Supreme Court of Arkansas modifying and affirming a judgment for damages against appellant Phillips Petroleum Company in favor of appellee and upholding the validity of section 7137, Crawford & Moses Digest of the Statutes of Arkansas, as against the contention that the same in so far as it abrogates the common law fellow-servant rule as to all corporations contravenes the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. The opinion is reported in 82 S. W. (2d) 264.

Jurisdiction.

The date of the judgment of the Supreme Court of Arkansas is May 6, 1935. Appellant Phillips Petroleum Company filed a petition for rehearing which was overruled on June 10, 1935. The petition for appeal was presented to the Chief Justice of the Supreme Court of Arkansas on June 24, 1935. Appellant United States Fidelity & Guaranty Company executed a supersedeas bond as surety for appellant Phillips Petroleum Company on appeal from the trial court to the Supreme Court of Arkansas. Judgment was rendered by the Supreme Court of Arkansas against United States Fidelity & Guaranty Company on the bond. For that reason the United States Fidelity & Guaranty Company joined in the appeal to this court.

Appellants invoke the jurisdiction of this court under Judicial Code, section 237(a), as amended (Title 28, U. S. C. A., section 344).

Appellee's Motion to Dismiss or Affirm.

Under date of July 6, 1935, appellee served upon counsel for appellants a copy of a "Motion to Dismiss or Affirm" and a copy of "Statement Making Against Jurisdiction and Argument in Support of Motion to Dismiss or Affirm." This brief is filed pursuant to paragraph 3 of Rule 12 of this court.

ARGUMENT.

The grounds of the motion to dismiss are *(1)* "want of jurisdiction; *(2)* "because the record fails to show that appellant is within the class with respect to whom it is alleged the statute under examination is unconstitutional"; *(3)* "because the record does not properly present a substantial federal question"; *(4)* "because the appeal is informal, irregular, and insufficient for reasons stated in the annexed argument and statement denying jurisdiction, and upon other grounds."

The ground for the motion to affirm is "that it is manifest that the appeal herein was taken for delay only, and that the question upon which it is claimed that the jurisdiction depends are [is] so frivolous as not to need further argument."

Three points are argued by appellee under the designations "A," "B," and "C," respectively. We shall discuss those points in the same order and under the same title as appellee.

A.

Record Fails to Show Appellant of Class Entitled to Raise Question.

Under this title appellee, without as much as intimating that appellant Phillips Petroleum Company is a railroad company or a company engaged in mining coal, advances the highly technical contention that the record does not show whether appellant does or does not operate a railroad

or a coal mine; that the statute is constitutional in so far as it affects railroad companies and companies engaged in the mining of coal; and that inasmuch as there is no affirmative showing that appellant is not of that class, it is in no position to urge that the statute is invalid as to all corporations.

Our answer to that contention is three-fold:

(1) Appellee's complaint alleges, and appellant's answer admits, that appellant is a foreign corporation and engaged in the production and transporation of oil and gas, which, in the absence of anything further, is sufficient to show that appellant is not a railroad company or a company engaged in mining coal.

(2) The burden was upon appellee to allege and prove that appellant was a railroad company or a company engaged in mining coal in order to bring his case within those provisions of the statute, and having alleged and established, only that appellant is a corporation, his case must stand or fall upon the validity or invalidity of the statute as applied to all corporations.

(3) The Supreme Court of Arkansas having decided the case on the theory that only that portion of the statute applicable to all corporations was involved, and having held the same valid, the jurisdiction of this court cannot be avoided by showing that the case might have been decided upon other grounds.

(1) Appellee alleged in his complaint (R. ...):

> "That the defendant, Phillips Petroleum Company, is a foreign corporation, authorized to do business in the State of Arkansas, and is engaged in the business of operating oil and gas wells, producing oil

and gas and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas, and in the counties of Ouachita and Union, and at all times mentioned herein was engaged in such business."

"That on April 5th, 1934, and for some time prior thereto, the plaintiff was in the employ of the defendant, Phillips Petroleum Company, in connection with the operation of its oil and gas wells and pipe lines in the State of Arkansas, and the counties of Ouachita and Union, in the capacity of a laborer; that defendant, Joe H. Myers, was at all times mentioned herein an employee of defendant, Phillips Petroleum Company, and a fellow-servant of plaintiff."

Appellant's answer (R. . .) admitted that it is a corporation organized to do business in Arkansas and engaged in the production and transportation of oil in Union and Ouachita counties, Arkansas, and that on April 5, 1934, plaintiff was in its employ, and that he, together with other employees of appellant, were engaged in stringing pipe at appellant's Fleming lease in Union County, Arkansas.

In the absence of anything further this was sufficient to affirmatively show that appellant was neither a railroad company nor a company engaged in mining coal. There was no occasion for appellant to allege and prove that it was not such.

(2) In support of his contention that the burden was upon appellant to affirmatively show that it was not a railroad company or a company engaged in mining coal, appellee cites the following cases:

Aluminum Company v. *Ramsey,* 222 U. S. 251, 56 L. ed. 185;

Wilmington Star Mining Company v. *Fulton,* 205 U. S. 60, 51 L. ed. 708;

Heald v. *District of Columbia*, 259 U. S. 114, 66 L. ed. 852;

Albany County v. *Stanley*, 105 U. S. 305, 26 L. ed. 1044;

New York, ex rel. Hatch, v. *Reardon*, 204 U. S. 152, 51 L. ed. 415;

Citizens National Bank v. *Kentucky*, 217 U. S. 443, 54 L. ed. 832;

Plymouth Coal Company v. *Pennsylvania*, 232 U. S. 531, 58 L. ed. 713;

Thomas Cusack Company v. *Chicago*, 242 U. S. 526, 61 L. ed. 472;

Arkadelphia Milling Company v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, 63 L. ed. 517.

Those cases support the rule as stated by Mr. Justice BRANDEIS in *Heald* v. *District of Columbia, supra*, that "one who would strike down a state statute as violative of the federal constitution must show that he is within the class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him." There was no question in that case or in the other cases cited as to the burden of proof. The facts were disclosed by the record and upon the facts as they appeared from the record the complaining party was not injured by the alleged unconstitutional feature of the statute. For example, in the *Heald* case a resident of the District of Columbia filed suit as committee of Peters, an insane person, also a resident of the District of Columbia, to recover certain taxes levied by Congress upon intangible properties of persons resident or engaged in business within the district. The Act of Congress was attacked on the grounds that it was invalid as to non-residents of the district and levied a tax upon bonds of states and their municipalities.

The court held that, since the plaintiff was a resident of the district and the property on which the tax was levied did not include any state or municipal bonds, he was in no position to raise the question.

The cases cited by appellee would be applicable here only if the record affirmatively showed that appellant was a railroad company or a company engaged in mining coal. The question of where lies the burden of proof was not considered in any of those cases. That is a question not difficult of solution. It depends upon the nature of the attack upon the statute. In suits brought by persons claimed to be affected by the statute for affirmative relief, such as the recovery of taxes paid or to enjoin the enforcement of a statute, the buden will, of course, rest upon them to prove that they come within the particular class of persons as to whom the statute is invalid. Likewise, in a suit such as this, to enforce a right created by statute, the burden is upon the plaintiff to prove that the defendant is one as to whom the statute is valid and that his cause of action is one coming within the valid provisions of the statute. An unconstitutional statute is the same as no statute. If the statute in question is void as to corporations in general it is the same as if its express provisions limited its application to railroad companies and companies engaged in mining coal. If the statute had so read and the plaintiff had filed this suit it would have been incumbent upon him to allege and prove that the defendant came within one of those provisions.

—*Brinkmeier* v. *Missouri Pacific Ry. Co.*, 224 U. S. 268, 56 L. ed. 758;

United States v. *Perryman*, 100 U. S. 235, 25 L. ed. 645;

St. Louis, I. M. & S. Ry. Co. v. *Hesterly*, 98 Ark. 240, 135 S. W. 874;

L. T. Dickason Coal Co. v. *Unverferth*, 30 Ind. App. 546, 66 N. E. 759.

At common law the master was not liable for injuries to an employee caused by the negligence of a fellow-servant. *Northern Pacific R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994; 39 C. J. 537. And a complaint which shows that the negligence on which the cause of action is based is that of a fellow-servant, in the absence of a statute, is demurrable.

—*Ashley* v. *Hart*, 147 Mass. 573, 18 N. E. 416, 1 L. R. A. 355;

Central of Georgia v. *Lamb*, 124 Ala. 172, 26 So. 969;

39 C. J. 935, 940, and cases cited.

It follows that the burden was upon appellee to allege and prove that appellant was a railroad company or a coal mining company in order to take advantage of those provisions of the statute. Having failed to allege or prove those facts, and they not otherwise appearing, the judgment in this case can be sustained only under that portion of the statute applicable to all corporations. And that is the theory upon which the case was decided both by the trial court and by the Supreme Court of Arkansas.

Appellant has fully met the burden of proving that it "is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him." Not only has it shown that the judgment in this case could only be sustained under that provision of the statute applicable to all corporations, but it has shown that the case was actually decided by the lower courts upon that theory.

(3) The contention now made by appellee was not so much as suggested to the Supreme Court of Arkansas. On the other hand it was there contended by appellee that the statute was valid as to all corporations as had been held by that court on numerous occasions. In ruling upon this question the Supreme Court said:

> "The petroleum company, in its motion for a new trial, filed approximately sixty-four days after the return of the verdict, raised the question of the constitutionality of section 7137, Crawford & Moses' Dig., upon which the liability of the petroleum company is predicated. This section abrogates the fellow-servant law in so far as it applies to corporations and creates liability as to them for injury to employees caused by negligence of fellow-servants. The contention that said act is unconstitutional is one of the grounds urged for a reversal of the judgment. It is the contention of the appellee that this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea. We pass this contention for the reason that this court, in numerous decisions for a period of more than twenty-five years, has upheld the constitutionality of section 7137, *supra*, the latest expression being in the case of *Postal Tel.-Cable Co.* v. *White*, (Ark.) 80 S. W. (2d) 633."

At most, appellee's contention amounts to the proposition that the Supreme Court of Arkansas might have decided the case upon a ground other than the one which it did. If appellee's contention is valid it should have been presented to the Supreme Court of Arkansas. But that was not the theory of appellee in the Supreme Court of Arkansas, and that was not the theory upon which the case was decided. Moreover, as we have shown above, the Supreme Court of Arkansas, under well settled principles;

could not have so ruled on the record in this case. Had it done so, the non-federal ground of the decision would have been unsubstantial and this court would have jurisdiction to review the judgment.

—*Broad River Power Company* v. *South Carolina*, 281 U. S. 537, 74 L. ed. 1023;

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 74 L. ed. 1107.

The jurisdiction of this court to review the ruling of a state court upon a constitutional question cannot be avoided by showing that the state court might have decided the case upon other grounds. *First National Bank* v. *Anderson*, 269 U. S. 341, 70 L. ed. 295; *Chicago, Rock Island & Pacific R. Co.* v. *Perry*, 259 U. S. 548, 66 L. ed. 1056. In the first case cited it was urged by motion to dismiss that this court was without jurisdiction because, although the state court decided the federal question, the judgment could be sustained on another ground, namely, that the suit was not one in which relief might be had in equity, there being an adequate remedy at law, etc. This court, in disposing of that contention, said:

> "The second ground is not better. The Supreme Court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

The second case cited is even more conclusive. That case involved the validity of the "Oklahoma Service Letter Act." The Supreme Court of Oklahoma passed upon the constitutionality of the act and held it valid. In dispos-

ing of a motion to dismiss the writ of error, this court said:

"Defendant in error moves to dismiss the writ of error on the ground that the constitutionality of the act was not really at issue; that the trial judge's instructions to the jury show that the only substantial question was whether the statements made in the letter actually given by the defendant were false and derogatory, and whether plaintiff had suffered damage thereby. But since the court of last resort of the state actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the Constitution of the United States, and decided in favor of its validity, it is clear that, under the first paragraph of Sec. 237, Judicial Code, as amended by Act of September 6, 1916, Chap. 448, 39 Stat. at L. 726, Comp. Stat., Sec. 1214, Fed. Stat. Anno. Supp. 1918, p. 412, we have jurisdiction to pass upon the question, and the motion to dismiss must be denied. * * *

"Again, in discussing the merits, defendant in error insists that the federal question is not necessarily involved; that the constitutional objection was waived when the company, instead of refusing to give a letter, of its own volition gave to Perry, upon his dismissal, a service letter which was false and derogatory, and which caused special damage that was pleaded and proved. At first blush, it seems somewhat strange for the company to aver that it acted under compulsion of a void statute, when what it did was contrary to the command of the statute; it almost looks as if it were merely held in damages for what ordinarily might be called a libel. *But the case cannot properly be dealt with upon this ground. The Supreme Court of Oklahoma not only passed upon the question of the constitutionality of the Service Letter Law, but deemed it necessary to pass upon it. So far as can be gathered from its opinion, there was no other legal ground upon which the judgment could be supported.* Apparently,

under the law of Oklahoma, apart from the statute, no legal duty was imposed upon the employer in such a case to speak the truth in a communication made respecting a discharged employee, nor was there other ground of liability for damages in case of its falsity. The statute is the essential foundation upon which the judgment rests, and we cannot find that the objections to its validity have been waived." (Emphasis ours.)

In *Ohio, ex rel. Clarke,* v. *Deckebach,* 274 U. S. 392, 71 L. ed. 1115, this court said:

"At the outset defendant insists that plaintiff has not established that he is entitled to the benefit of the treaty since his allegation of citizenship is not admitted on the face of the pleadings. But the Supreme Court of Ohio has construed the pleadings as sufficient to draw in question the validity of the ordinance under the treaty. Hence we need not concern ourselves with those refinements of the local law of pleading which, it is said, enable defendant to justify his refusal to issue a license because of plaintiff's assertion of British citizenship, and at the same time deny that plaintiff has established citizenship entitling him to the protection of the treaty."

This court has repeatedly held that no matter how or when the constitutional question is raised, to the extent that it is passed upon by the state Supreme Court, this court has jurisdiction to review the judgment. Thus, in *Nickey* v. *Mississippi,* 292 U. S. 393, 78 L. ed. 1323, this court said:

"So far as the state court discussed these contentions, with specific reference to the Constitution of the United States, both in its original opinion, and in an opinion denying the appellants' application for rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignment of errors to the state Supreme Court, as required by its rule."

And in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565, the court said:

> "We may disregard the ambiguity of the trustees' contention below that the statutes were 'unconstitutional,' in so far as the state court understood that the Federal Constitution was the basis for the objection and in its opinion sustained the statutes under that instrument * * *. To that extent the case is properly here on writ of error."

The Supreme Court of Arkansas having deemed it necessary to pass upon the constitutionality of the statute as applied to corporations, and having done so, the case is properly here.*

---

*It has been suggested by counsel for appellee that the constitutional question was not raised in the trial court. While that point is immaterial in view of the fact that the Supreme Court of Arkansas actually passed upon the constitutional question (*Rothschild* v. *Knight*, 184 U. S. 334, 46 L. ed. 573; *San Jose Land and Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 47 L. ed. 765; *Manley* v. *Park*, 187 U. S. 547, 47 L. ed. 296; *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 74 L. ed. 926; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 75 L. ed. 690; *Grayson* v. *Harris*, 267 U. S. 352, 69 L. ed. 652; *Rogers* v. *County of Hennepin*, 240 U. S. 184, 60 L. ed. 594; *Gant* v. *Oklahoma City*, 289 U. S. 98, 77 L. ed. 1058; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. ed. 360; *Fiske* v. *Kansas*, 274 U. S. 380, 71 L. ed. 1108; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. ed. 239; *Sully* v. *Am. Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072; *Nickey* v. *Miss.*, 292 U. S. 393, 78 L. ed. 1323, 1325; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565, 566; *Cumberland Coal Co.* v. *Bd. of Revision of Tax Assessments in Greene County, Pa.*, 284 U. S. 23, 76 L. ed. 146), we cannot let this statement go unchallenged. Whether or not a constitutional question is properly raised is a question for this court and not the state court. *First National Bank* v. *Anderson, supra.* In this case appellant requested the court to instruct the jury to return a verdict in its favor and excepted to the instruction of the court to the jury that appellant was liable for the acts of negligence of its employee Myers. The constitutionality of the statute upon which appellee's cause of action was based was thereby drawn in question (*People of New York* v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184, 62 A. L. R. 785; *International Harvester Co. of America* v. *Missouri*, 234 U. S. 199, 58 L. ed. 1276; *National Mutual Building & Loan Assn. of New York* v. *Brahan*, 193 U. S. 635, 48 L. ed. 823; *Murray* v. *Charleston*, 96 U. S. 432, 24 L. ed. 760; *Scott* v. *Eaton*, 15 Wall. 380, 21 L. ed. 72; *Murdock* v. *Mayor of Memphis*, 20 Wall. 590, 22 L. ed. 429, 441; *Satterlee* v. *Matthewson*, 2 Peters 380, 7 L. ed. 458, 468; *Crowell* v. *Randell*, 10 Peters 368, 9 L. ed. 458; *Craig* v. *Missouri*, 4 Peters 410, 7 L. ed. 903; *Wilson* v. *Black Bird Creek Marsh Co.*, 2 Peters 245, 7 L. ed. 412).

B.

Record Does Not Properly Present a Substantial Federal Question.

This contention is frivolous in the extreme. There was drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States and the decision of the state Supreme Court was in favor of its validity. This court has jurisdiction. Section 237(a), Judicial Code (Title 28 U. S. C. A., section 344).

The question has never been decided by this court, but in *Aluminum Company* v. *Ramsey*, 222 U. S. 251, 56 L. ed. 185, this court refused to uphold the act as applied to all corporations, as the Supreme Court of Arkansas had done, but affirmed the judgment on the ground that the act was valid as to railroad companies and that appellant being a railroad company could not question the validity of the act as to corporations in general. In that case this court questioned the reasoning of the Arkansas court in upholding the act as to corporations in general, saying:

> "In *Ozan Lumber Co.* v. *Biddle, supra,* the court decided that 'the fellow-servant law' was an amendment to the charters of corporations, made under the right reserved in the Constitution of the state to repeal, alter, or amend such charters. The Ozan Lumber Company, however, was a domestic corporation and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local; so we pass to the consideration of the merits."

In the numerous decisions of the Arkansas Supreme Court upholding the act as to corporations, no reason has ever been given other than that expressed in *Ozan Lumber Co.* v. *Biddle,* 87 Ark. 587, 113 S. W. 796; namely, that the power existed under the reservation to the state of the right to amend charters of corporations.

The opinion of the state Supreme Court in this case was by a divided court—4 to 3. Similar statutes have been held unconstitutional by the Supreme Courts of Mississippi and Indiana, respectively, and by the Circuit Court of Appeals for the Eighth Circuit. *Ballard* v. *Mississippi Cotton Oil Co.,* 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476; *Bedford Quarries Co.* v. *Bough,* 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418; *Chicago, M. & St. P. Ry. Co.* v. *Westby,* 178 Fed. 619. Arkansas stands alone among the courts passing upon this question and its reasoning in upholding the statute has been at least questioned by this court.

Burdens placed upon corporations by state statutes because they are such, having no reasonable support in that fact, and not placed upon individuals and partnerships, have consistently been held by this court to contravene the Fourteenth Amendment to the Constitution of the United States. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666; *Kentucky Finance Co.* v. *Paramount Auto Exchange,* 262 U. S. 544, 67 L. ed. 1112; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490, 71 L. ed. 1165; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927. And see *Frost* v. *Corporation Commission of Oklahoma,* 278 U. S. 516, 73 L. ed. 483, where it was held that burdens placed upon individuals and not upon corporations where there

was no reasonable ground for the distinction contravene the Fourteenth Amendment.

These considerations abundantly support the jurisdiction of this court. In *Louisville & Nashville R. Co.* v. *Melton*, 218 U. S. 36, 54 L. ed. 921, this court said:

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the federal question relied upon will be found, upon an examination of the merits, to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations: *(a)* Because analysis and expounding are necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; *(b)* because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the 14th Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and *(c)* because, while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power, consistently with the equal protection of the law clause, to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the

statute under review, as construed below, is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject."

Color for the contention that the statute is unconstitutional is all that is required to present a substantial federal question. *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 51 L. ed. 708.

Appellee contends that the statute will not be declared unconstitutional unless facts made known or generally assumed are such as to preclude the assumption that the classification rests upon some rational basis. The cases cited, however, do not go to the extent requisite to uphold the classification made by the Arkansas statute. Counsel for appellee advance as the only concrete reasons which the legislature may have had in mind in enacting the statute that "the Legislature may have believed that an individual master who would of necessity come in personal contact with his men and their families would feel sufficient moral responsibility for their safety to insure that he would employ only careful and prudent men to work with them, while in the case of a corporation, acting only through agents, with the management often far removed from the scene of operations, no such personal and moral responsibility would exist and the safety of men could be better insured by making the corporation responsible for the negligent acts of the men whom it employed.

"Likewise, the Legislature may have found that generally in Arkansas corporations were engaged in that type of business which carried with it increased hazards to their employees, such as manufacturing, mining, operating rail-

roads, street cars, electrical systems, gas lines, etc., while as a general rule the individual employer was engaged in business where his employee was relatively safe, such as agriculture, the trades, etc."

The first theory makes an unwarranted assumption of facts. An individual master does not "of necessity come in personal contact with his men and their families." While the management of a corporation is often far removed from the scene of operations, the same is true of individual and partnership employers. And the fact that the legislature may have thought that individual employers would feel sufficient moral responsibility for the safety of their employees to employ only careful and prudent men to work with them would not be a sufficient basis for classification. Even at common law masters were liable for negligently employing incompetent fellow-servants, and neither individuals nor corporations could be expected to use more than reasonable care in employing servants, whether made liable or not for the negligence of their employees resulting in injury to a fellow-servant.

Section 1700, Crawford & Moses Digest of the Statutes of Arkansas, authorizes the formation of corporations to engage in any lawful business. Section 1825 authorizes foreign corporations to do business in the state. It would be fantastic to assume that corporations in Arkansas are engaged only in the more hazardous businesses while the individuals are engaged in only those that are relatively safe. That the legislature had no such thought in mind is clearly shown by the statute itself. The statute specifically includes railroad companies and coal mining companies, whether incorporated or not, thus showing that the legislature thought those businesses were particularly hazardous and required

separate classification, and that applying the act to corporations only would not be sufficient to reach them. If counsel's theory is correct the statute would have made no mention of railroad or coal mining companies but would have applied to corporations only. But the legislature knew what all reasonable men know; that corporations and individuals in Arkansas are engaged in all kinds of businesses, some hazardous, some safe, and that the character of the employer (whether incorporated or not) is no criterion of the nature of the business. The court will not assume otherwise.

Had the statute of Arkansas permitted corporations to be formed or admitted to carry on certain hazardous businesses only and prohibited individuals from engaging in such businesses, then it perhaps would have been permissible to classify corporations and individuals for the purpose of the fellow-servant act. But, inasmuch as the statute authorizes corporations to carry on any lawful business, the court will not indulge in the fantastic assumption that there are differences in those businesses in which corporations are engaged from those in which individuals are engaged sufficient to justify the classification, and the court can only conclude that the classification of corporations was purely arbitrary. This has been confirmed repeatedly by the Supreme Court of Arkansas in upholding the act. No justification for the classification has ever been attempted by that court other than the one time, *Ozan Lumber Co.* v. *Biddle, supra,* wherein the court said:

> "Acts of legislatures imposing such liability on railroad companies have been upheld by the courts on account of the hazardous character of the business of operating a railway. The only difference of the reason

for such acts and the act in question is the danger of the service of railroads is greater than that of other corporations—a difference in degree, and not in kind."

The court thus wholly fails to give any reason for discriminating between corporations and individuals engaged in the same business.

C.

Question One of Local Law.

This identical contention was made in the case of *Aluminum Company* v. *Ramsey, supra,* as to the identical statute and was rejected. See, also, *Lake Shore & Mich. So. Ry. Co.* v. *Smith,* 173 U. S. 684, 43 L. ed. 858, 864; *Stearns* v. *Minnesota,* 179 U. S. 223, 45 L. ed. 162; *Chicago, M. & St. P. R. Co.* v. *Wisconsin,* 238 U. S. 491, 59 L. ed. 1423, L. R. A. 1916-A, 1133.

Respectfully submitted,

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No. 386

In the Supreme Court of the United States

October Term, 1935.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

BRIEF OF APPELLANTS.

NEILL C. MARSH, SR.,
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(b) Even though it be assumed that appellant operated a railroad or a coal mine, the statute will not be construed to apply to an employee, such as appellee, who was not employed in either of those businesses but was employed in the oil and gas business; if construed to apply to such an employee, the statute would contravene the due process clause of the Fourteenth Amendment to the Federal Constitution	20
(c) In order to bring his case within the valid provisions of the statute, the burden was upon appellee to allege and prove that appellant was a railroad company or was engaged in mining coal, which he failed to do—he did not even suggest that such were the facts	22
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Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, in so far as it provides that "all corporations of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant, or employee, denies to corporations the equal protection of the law and deprives them of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States 38

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1935.

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, ***Appellants,***

vs.

R. O. JENKINS, ***Appellee.***

Appeal From the Supreme Court of the State of Arkansas.

BRIEF OF APPELLANTS.

PART I.

Jurisdiction.

There has heretofore been filed herein a statement as to jurisdiction, as required by Rule 12, Paragraph 1, of this court, a statement of appellee making against jurisdiction and motion to dismiss or affirm, and brief of appellants in opposition to motion to dismiss or affirm. Inasmuch as the clerk has advised that further consideration of jurisdiction has been postponed to the hearing on the merits, we have deemed it proper to consolidate herein and amplify some-

what the contentions of appellants with respect to the jurisdiction of this court.

The United States Fidelity & Guaranty Company joined in this appeal because of the fact that it was surety on the supersedeas bond of appellant Phillips Petroleum Company on the appeal to the Supreme Court of Arkansas and the judgment of that court was against the surety on the bond (R. 87) as well as the Phillips Petroleum Company; hence, the term "appellant" used in this brief will refer to Phillips Petroleum Company alone. Judgment was also rendered against Joe H. Myers, but he gave no supersedeas bond and has not appealed from said judgment. A severance was had as to Myers. (R. 96)

The Decision Below.

This is an appeal from the judgment of the Supreme Court of Arkansas, modifying and affirming a judgment for damages in favor of appellee and against appellant and upholding the validity of section 7137, Crawford & Moses Digest of the Statutes of Arkansas, as against the contention that the same, insofar as it abrogates the common law fellow-servant rule as to all corporations, contravenes the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States. The opinion is reported in 190 Ark. 964, 82 S. W. (2d) 264, and is found in the printed record herein at page 88.

Statement as to Jurisdiction.

1. The statutory provisions believed to sustain the jurisdiction are:

Section 237 (a) of the Judicial Code (Title 28, U. S. C. A., section 344 (a)), which provides:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

An act approved January 31, 1928, chapter 14, section 1, 70th Congress, 45 U. S. Statutes at Large, page 54 (Title 28, U. S. C. A., section 861 (a)), which provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

2. The statute of the State of Arkansas, the validity of which is involved, is section 7137, Crawford & Moses Digest of the Statutes of Arkansas, reading as follows:

> "Hereafter all railroad companies operating within this state, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees, being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or

which may result from the carelessness, omission of duty or negligence of any other agent, servant or employe of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

Only that portion of the above statute applicable to "all corporations of every kind and character" is involved, the appellant not being a railroad company or engaged in the mining of coal.

3. The date of the judgment of the Supreme Court of Arkansas is May 6, 1935. (R. 87) Appellant filed a petition for rehearing which was overruled on June 10, 1935. (R. 93) The petition for appeal was presented to the Chief Justice of the Supreme Court of Arkansas on June 24, 1935. (R. 97)

4. The action was filed in the Circuit Court of Ouachita County, Arkansas, Second Division, by appellee against appellant and Joe H. Myers, for the recovery of damages for personal injuries alleged to have been sustained by appellee as the result of negligence of Joe H. Myers while both appellee and Myers were engaged in the performance of their duties for appellant. (R. 3) The complaint alleged that appellant was a foreign corporation authorized to do business in the State of Arkansas, and was engaged in the business of operating and producing oil and gas and laying and operating pipe lines for the transportation of oil and gas, and that plaintiff was in the employ of appellant in connection with the operation of its oil and gas wells and pipe lines in the Counties of Ouachita and Union, State of Arkansas, in the capacity of a laborer and "that defendant, Joe H. Myers, was at all times mentioned herein an employee of

defendant Phillips Petroleum Company and a fellow-servant of plaintiff". (R. 3, 4) It was further alleged that appellee and Myers were engaged in carrying a joint of pipe in the performance of their duties for appellant under the instructions of their foreman, Jim Forsyth, appellee carrying the front end and Myers carrying the rear end. Myers is alleged to have shifted the pipe from one shoulder to the other, thereby jerking the pipe causing appellee to become overbalanced and to step in a hole in the ground and fall. (R. 4) No other act of negligence was charged. On the contrary, it was specifically alleged "that the injuries to plaintiff were caused solely on account of the negligence and carelessness of the defendant Joe H. Myers in the following particulars, to-wit: * * *", and, further, "That the injuries to the plaintiff were caused solely on account of the overt acts of the said Joe H. Myers as above set out and that at the time such acts were committed by the said Joe H. Myers he was a fellow-servant of the plaintiff, both being in the employ of the defendant Phillips Petroleum Company." (R. 6) The evidence of appellee tended to support the allegations of his complaint. It was not charged and there was no evidence to prove that appellant was a railroad company or engaged in the mining of coal. The only applicable part of the foregoing statute therefore was that portion relating to all "corporations of every kind and character."

For reversal of the judgment appellant relies upon the following cases:

Gulf, C. & S. F. R. Co. v. *Ellis,* 165 U. S. 150, 41 L. ed. 666;

Cotting v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 46 L. ed. 92;

Kentucky Finance Corporation v. *Paramount Auto*

Exchange Corporation, 262 U. S. 544, 67 L. ed. 1112;

Power Mfg. Co. v. *Saunders,* 274 U. S. 490, 71 L. ed. 1165;

Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927;

Frost v. *Corporation Commission of Oklahoma,* 278 U. S. 516, 73 L. ed. 483;

Ballard v. *Mississippi Cotton Oil Co.,* 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476;

Bedford Quarries Co. v. *Bough,* 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418;

Chicago, M. & St. P. R. Co. v. *Westby,* (8 C. C. A.) 178 Fed. 619.

The Constitutionality of the Statute Was Drawn in Question and Was Decided.

The trial court, over the objection and exception of the appellant, gave to the jury "Plaintiff's Instruction No. 1," advising the jury, in substance, that, if Myers was negligent as alleged and appellee was injured thereby, the appellant was liable. (R. 81)

Appellant requested the court to direct the jury to return a verdict in its favor, which request was refused and to which appellant excepted. (R. 79)

Appellant filed a motion for new trial in the trial court within the time allowed by the statutes of Arkansas, in which it was alleged that the court erred in refusing to give an instructed verdict for appellant and erred in giving to the jury plaintiff's Instruction No. 1, specifically charging that section 7137 of Crawford & Moses Digest of the Statutes of Arkansas, which purports to make corporations li-

able for injuries to an employee by the negligence of a fellow-servant, is unconstitutional and void, in that it violates and contravenes section 1 of article 14 of the Constitution of the United States "in that this defendant, a corporation, is a citizen and that it is denied equal protection of the laws in its property rights with other citizens of Arkansas who are individuals in that said law (Sec. 7137, C. & M. Digest) attempts to make it respond in damages to its servant for the negligence of a fellow-servant, but does not impose upon individuals employing servants the duty to respond in damages to a servant for the negligent act of a fellow-servant, and that it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine." (R. 11-16)

The motion for new trial was considered by the trial court and overruled. (R. 16) The constitutionality of said statute was briefed and argued in the Supreme Court of Arkansas and the validity of the statute was upheld by that court in the following language:

> "The Petroleum Company, in its motion for a new trial, filed approximately sixty-four days after the return of the verdict, raised the question of the constitutionality of Sec. 7137 of Crawford & Moses' Digest upon which the liability of the Petroleum Company is predicated. This section abrogates the fellow-servant law insofar as it applies to corporations and creates liability as to them for injury to employees caused by negligence of fellow-servants. The contention that said act is unconstitutional is one of the grounds urged for a reversal of the judgment. It is the contention of the appellee that this question was waived by the failure of the de-

fendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea. We pass this contention for the reason that this court, in numerous decisions for a period of more than twenty-five years, has upheld the constitutionality of Section 7137, *supra*, the latest expression being in the case of *Postal Telegraph-Cable Co.* v. *White*, Law Rep., Vol., 56, p. 291, Ms. Op." (R. 89, 90)

In order to get the full purport of the court's decision and to see that the court, in upholding the constitutionality of the statute, was referring to the Federal Constitution, it is only necessary to refer to the case cited, to-wit, *Postal Telegraph-Cable Co.* v. *White*, 190 Ark. 365, 80 S. W. (2d) 633, where it was said:

"Appellant also contends that the statute, section 7144 of Crawford & Moses' Digest, known as the 'fellow servant law,' is void, and that this judgment based thereon must be reversed for that reason. It is argued that this law is void because in conflict with the provision of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the law. * * *

"*The prototype of this act (section 7137 of Crawford & Moses' Digest) was said by this court not to offend against the Fourteenth Amendment to the Constitution of the United States more than a quarter of a century ago, and has not been successfully assailed since that time.* See *Ozan Lumber Company* v. *Biddie*, 87 Ark. 587, 113 S. W. 796. This act itself was passed in 1913 and has never been successfully attacked as impinging upon the Fourteenth Amendment of the Constitution of the United States. The act has been upheld in numerous cases by this court against the charge that it was repugnant to the equal protection clause of said amendment. *Caddo River Lumber Co.* v. *Grover*,

126 Ark. 449, 190 S. W. 560; *Arkansas Stave Co.* v. *State*, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (n.s.) 255, 140 Am. St. Rep. 103; *Aluminum Co. of North America* v *Ramsey*, 89 Ark. 522, 117 S. W. 568."

In view of the fact that the Supreme Court of Arkansas ruled upon the validity of the statute and held that it did not violate the Fourteenth Amendment to the Federal Constitution, it becomes immaterial whether or not the question was properly and timely raised in the trial court, although, as we shall presently show, the statute was properly and timely drawn in question by the request for an instructed verdict and the exception to plaintiff's Instruction No. 1.

—*Rothschild* v. *Knight*, 184 U. S. 334, 46 L. ed. 573;

San Jose Land & Water Co. v. *San Jose Ranch Co.*, 189 U. S. 177, 47 L. ed. 765;

Manley v. *Park*, 187 U. S. 547, 47 L. ed. 296;

Home Insurance Co. v. *Dick*, 281 U. S. 397, 74 L. ed. 926;

Abie State Bank v. *Bryan*, 282 U. S. 765, 75 L. ed. 690;

Whitney v. *California*, 274 U. S. 357, 71 L. ed. 1095;

Saltonstall v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565;

Nickey v. *Mississippi*, 292 U. S. 393, 78 L. ed. 1323;

Miedreich v. *Lauenstein*, 232 U. S. 236, 58 L. ed. 584;

Cissna v. *Tennessee*, 246 U. S. 289, 62 L. ed. 720;

Sully, Trustee, v. *American National Bank*, 178 U. S. 289, 44 L. ed. 1072;

Meyer v. *Richmond*, 172 U. S. 82, 43 L. ed. 374;

First National Bank v. *Anderson*, 269 U. S. 341, 70 L. ed. 295;

Chicago, Rock Island & Pac. R. Co. v. *Perry*, 259 U. S. 548, 66 L. ed. 1056.

The foregoing decisions, and numerous others which could be cited, firmly establish the rule that, to the extent the state court passes upon contentions with respect to the Constitution of the United States, whether in its original opinion or upon a petition for rehearing, the decision is subject to review by this court. Thus, in *Nickey* v. *Mississippi, supra*, this court said:

> "So far as the state court discussed these contentions with specific reference to the Constitution of the United States, both in its original opinion, and in an opinion denying the appellants' application for rehearing, they may be reviewed here, notwithstanding the failure of appellants to mention them in their assignment of errors to the state Supreme Court, as required by its rule."

And in *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565, the court said:

> "We may disregard the ambiguity of the trustees' contention below that the statutes were 'unconstitutional', in so far as the state court understood that the Federal Constitution was the basis for the objection and in its opinion sustained the statutes under that instrument * * *. To that extent the case is properly here on writ of error."

In *Rothschild* v. *Knight, supra*, it was held that a federal question raised for the first time on writ of error to the State Supreme Court was sufficient to give the Federal Supreme Court jurisdiction on writ of error.

And in *Meyer* v. *Richmond, supra*, it was held that a constitutional question presented for the first time in a second motion to vacate a judgment on demurrer to the peti-

tion, where overruled by the trial court and affirmed by the Supreme Court, was in sufficient time to give this court jurisdiction to review the judgment.

Not only did the Supreme Court of Arkansas decide the constitutional quention, but the validity of the statute was properly drawn in question even prior to the motion for new trial. It was drawn in question by the request for a directed verdict and by the exception to plaintiff's Instruction No. 1.

In *Satterlee* v. *Matthewson*, 2 Peters 380, 7 L. ed. 458, in an opinion by Mr. Justice WASHINGTON, it was held that a state statute was drawn in question by an instruction of the trial court to the jury that the statute was applicable to the case, where the right of the plaintiff to recover depended upon the statute. In disposing of the contention that there was nothing apparent on the record to raise the constitutional question, the court said:

> "Questions of this nature have frequently occurred in this court, and have given occasion for a critical examination of the above section, which has resulted in the adoption of certain principles of construction applicable to it, by which the objection now to be considered may, without much difficulty, be decided. 2 Wheaton, 363; 4 Wheaton 311; 12 Wheaton, 117. One of those principles is, that if it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the Constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the Act referred to; although the record should not, in terms, state a misconstruction of the Constitution of the United States, or that the repugnancy of the statute of the state to any part of that Constitution was drawn into question.

"Now, it is manifest from this record, not only that the constitutionality of the statute of the 8th of April, 1826, was drawn into question, and was applicable to the case, but that it was so applied by the judge, and formed the basis of his opinion to the jury, that they should find in favor of the plaintiff, if in other respects she was entitled to a verdict. It is equally manifest that the right of the plaintiff to recover in that action depended on that statute; the effect of which was to change the law, as the Supreme Court had decided it to be in this very case in the year 1825. 13 S. & R. 133."

Wilson v. *Black Bird Creek Marsh Co.*, 2 Peters 245, 7 L. ed. 412, was a case in which the defendant in error sued the plaintiffs in error for trespass for the breaking of a dam erected by plaintiffs in error pursuant to an Act of the General Assembly of Delaware. The defendants in error filed a plea in which they stated that the dam was in a navigable stream and was wrongfully erected and that they had a right to remove the same. To that plea the defendants in error demurred generally and the demurrer was sustained. There was no specific mention of the Constitution or of any law of the United States. The court, in an opinion by Mr. Chief Justice MARSHALL, held that the constitutionality of the statute was necessarily drawn in question, and that the court in sustaining the right of defendants in error to recover upheld the validity of the statute.

While in the case at bar the court, in its instructions to the jury, said nothing about the statute, the court did tell the jury that appellant should be held liable if its employee Myers was negligent and appellee was injured thereby. That instruction can only be justified by the statute, inasmuch as at common law the master was not liable for in-

juries to his servant caused by a fellow-servant. *Northern Pac. R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994; *Graham* v. *Thrall*, 95 Ark. 560, 129 S. W. 532; 39 C. J. 537. Therefore, appellant's exception to that instruction drew in question the constitutionality of the statute.

In *Crowell* v. *Randell*, 10 Peters 368, 9 L. ed. 458, in an opinion by Mr. Justice STORY, all of the previous decisions of the Federal Supreme Court were reviewed and the following conclusion was reached:

> "These are all the cases, it is believed, in which the construction of the twenty-fifth section of the Judiciary Act has been made matter of controversy; and they extend over a period of more than twenty-five years. They exhibit an uniformity of interpretation of that section which has never been broken in upon. They establish, so far as a course of decision can establish, the propositions already stated in the early part of this opinion. The period seems now to have arrived in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is, that to bring a case within the twenty-fifth section of the Judiciary Act, it must appear upon the face of the record, *1st*. That some one of the questions stated in that section did arise in the State Court. *2nd*. That the question was decided by the State Court, as required in the same section. *3rd. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment. *4th*. That it is not sufficient to show that a question might have arisen or been applicable to the

*All emphasis of quotations herein is ours.

case, unless it is further shown, on the record, that it did arise, and was applied by the State Court to the case."

Many of the cases reviewed in that opinion clearly show that wherever the plaintiff's cause of action is based upon a statute, in the absence of which he would not be entitled to recover, and a recovery is had, the court necessarily decided in favor of the validity of the statute.

In *Murray* v. *Charleston*, 96 U. S. 432, 24 L. ed. 760, the City of Charleston passed ordinances pursuant to state statute, assessing a tax of two cents upon the dollar of the value of all real and personal property in the City of Charleston. The plaintiff was the owner of certain stock of the City of Charleston, which was really a debt of the city. The city deducted from the interest on the stock the amount of the tax. Suit was brought to recover the same by the plaintiff, a resident of Germany. The city answered, setting up the ordinance in justification of its retention of the amount of the tax. Judgment was rendered upon the pleadings for the defendant and was sustained by the Supreme Court of the state. This court held that it had jurisdiction, notwithstanding the fact that there was no formal reference to any clause in the Constitution. The court said that the question was directly presented whether the ordinances could relieve the debtor from its full compliance with its promise to pay the stipulated amount of interest. "The court gave judgment for the defendant, which would have been impossible had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction therefore is manifest."

In *Murdock* v. *Mayor, etc., of Memphis*, 20 Wall. 590, 22 L. ed. 429, 441, the court, in speaking of its jurisdiction under what is now section 237 (a) of the Judicial Code, said:

> "It has been many times decided by this court on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court by pleadings, *prayer for instruction or other appropriate method*, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on its merits." (Citing authorities.)

In *National Mutual Building & Loan Association* v. *Brahan*, 193 U. S. 635, 48 L. ed. 823, it was held that a federal question is presented in time and in proper form by requested instructions in a trial court asserting rights under the Federal Constitution, which, if they actually exist, entitle the party asserting them to an instruction directing a verdict in its favor.

In *People of New York* v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184, 62 A. L. R. 785, the court said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary

effect of the judgment has been to deny the claim, that is enough."

These cases and many others that could be cited clearly show that the validity of the statute was drawn in question by the exception to plaintiff's Instruction No. 1 and by the request for an instructed verdict. Appellee could not have recovered in the absence of the statute. His right to recover was challenged and the court, in instructing the jury that appellant was liable for the negligence of Myers and in refusing to instruct a verdict for appellant, upheld the validity of the statute. The identical question, as applied to railroad companies, was raised in the same manner in *Missouri Pac. Ry. Co.* v. *Mackey,* 127 U. S. 206, 32 L. ed. 107, and the court assumed jurisdiction.

Moreover, the state law of Arkansas does not require that questions of this character be raised in specific terms.

It was held in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Hesterly,* 98 Ark. 240, 135 S. W. 874, that the applicability of the Federal Employers' Liability Act was raised by a motion for an instruction in general terms that no damages for pain and suffering could be allowed. See also the same case, 228 U. S. 702, 57 L. ed. 1031.

It is the law of that state that a general objection to an inherently erroneous instruction as distinguished from one erroneous in form is sufficient to raise the question of whether or not it correctly states the law.

Missouri Pac. R. Co. v. *Warrick,* 164 Ark. 556, 262 S. W. 644;

Missouri Pac. R. Co. v. *Johnson,* 167 Ark. 464, 268 S. W. 31;

Arkebauer v. *Falcon Zinc Co.,* 178 Ark. 943, 12 S. W. (2d) 916.

But, as we have heretofore pointed out, in view of the fact that the State Supreme Court passed upon the constitutionality of the statute, it is not now material whether or not the constitutional question was raised prior to the time the motion for new trial was filed.

Appellee's Motion to Dismiss or Affirm.

The grounds of the motion to dismiss are *(1)* "want of jurisdiction"; *(2)* "because the record fails to show that appellant is within the class with respect to whom it is alleged the statute under examination is unconstitutional"; *(3)* "because the record does not properly present a substantial federal question"; *(4)* "because the appeal is informal, irregular, and insufficient for reasons stated in the annexed argument and statement denying jurisdiction, and upon other grounds."

The ground for the motion to affirm is "that it is manifest that the appeal herein was taken for delay only, and that the question upon which it is claimed that the jurisdiction depends are [is] so frivolous as not to need further argument."

We have heretofore filed a brief in opposition to the motion to dismiss or affirm. That brief, together with the argument which we shall make herein on the merits, is sufficient to dispose of grounds (1), (3) and (4) and they will not be reargued herein. But we desire to amplify somewhat the argument made in answer to appellee's contention that the record fails to show that appellant is within the class with respect to whom it is alleged the statute under examination is unconstitutional.

Counsel for appellee contend, without as much as inti-

mating that appellant *is* a railroad company or a company engaged in mining coal, that the record does not show whether appellant does or does not operate a railroad or a coal mine; that the statute is constitutional insofar as it affects railroad companies and companies engaged in the mining of coal; and that, inasmuch as there is no affirmative showing that appellant is not of that class, it is in no position to urge that the statute is invalid as to all corporations. Our answer to that contention is fourfold:

(1) Appellee's complaint alleges, and appellant's answer admits, that appellant is a foreign corporation engaged in the production and transportation of oil and gas and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas and that appellee was injured while in the employ of appellant in connection with the operations of its oil and gas wells and pipe lines. (R. 3, 4, 7) It was not contended at the trial by either party that appellant was a railroad company or engaged in the mining of coal.

In the absence of anything further, this was sufficient to affirmatively show (if it was necessary to so show) that appellant was neither a railroad company nor a company engaged in the mining of coal. There being no allegation of such, there was no occasion for appellant to deny or allege that it was not a railroad company or engaged in the mining of coal.

In *Sully, Trustee,* v. *American National Bank,* 178 U. S. 289, 44 L. ed. 1072, the court, in answering the contention that one of the appellants was not in a position to raise the constitutional question because it did not appear that he was a citizen of another state than Tennessee, said:

"The further objection made to Carhart is that it does not appear that he is a citizen of another state than Tennessee, and hence cannot avail himself of the fact of such citizenship in order to claim that his rights as such citizen have been infringed within the meaning of section 2 of article 4 of the Constitution, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. We think the objection untenable.

"In his original bill to foreclose the mortgage securing the $85,000 of bonds held by him, he described himself as a resident of the State of New York; and in the petition of Mrs. Myton and Mr. Carhart, filed October 11, 1895, in the two cases of the bank against the land company, and Sully, trustee, against the land company, Mrs. Myton is described as a resident of the state of New York, and A. B. Carhart is described as a resident of the City of Brooklyn. *No question seems to have been made throughout the litigation as to the citizenship of those parties. The question does not seem to have arisen in any stage of the case up to the argument in this court.* Although there may be some slight difference in the facts between this case and those which are stated in *Blake* v. *McClung*, 172 U. S. at page 246, 43 L. ed. 434, 19 Sup. Ct. Rep. 165, *we yet think that Carhart brings himself within the principle decided in that case, and that his citizenship in the State of New York should be regarded as sufficiently proved.*"

Even though there had been a burden upon appellant to allege and prove that it was not a railroad company or engaged in the mining of coal, the above case is authority for the proposition that where the case was tried on the theory that appellant was engaged in the production and transportation of oil and gas and not in the railroad or coal business, it will be deemed that such negative facts are established.

Moreover, we think that the very allegation that appellant was engaged in a certain business is sufficient to imply that it was not engaged in another and entirely different kind of business. And, again, the very name "Petroleum Company" which appellant bears negatives the idea that it is a railroad company or a coal mining company.

(2) It is apparent from the record in this case that appellant is not a railroad company in the general sense in which that term is understood, for railroad companies are not ordinarily engaged in the production and marketing of petroleum and natural gas, as the record shows appellant to have been; and, if it was engaged in the mining of coal, it certainly was not engaged exclusively in that business. Therefore, if appellant could in any sense be considered a railroad company or a company engaged in the mining of coal, only part of its business could be so considered, and appellee was employed in another kind of business not related to or in furtherance of the railroad business or coal mining business. Consequently, even though it should be presumed that appellant operated a railroad at some point or operated a coal mine, the statute would be inapplicable to appellee and other employees engaged in the production and transportation of oil, not in furtherance of the railroad or coal mining businesses; and liability in this case could only be predicated upon the statute applicable to corporations in general. While it has been held by this court that it is permissible to classify all railroad company employees, whether engaged in the actual work of operating trains or not (*Louisville & Nashville R. Co.* v. *Melton,* 218 U. S. 36, 54 L. ed. 921; *Mondou* v. *N. Y., N. H. & Hartford R. Co.,* 223 U. S. 1, 56 L. ed. 327); nevertheless, it has never been held that all employees of a corporation, regardless of the particular

business in which they are engaged, may be classified for purposes of this kind because of the fact that the corporation at some point operates a line of railroad. This court held the Arkansas statute with respect to railroads was applicable to a company which operated a short line of railroad in connection with its mines, *where the injured employee was engaged in operating trains on that railroad. Aluminum Co. of N. A.* v. *Ramsey*, 222 U. S. 251, 56 L. ed. 185. Should a statute of this kind be construed to apply to the employees of such a company engaged in a business wholly unrelated to and not in furtherance of the railroad business or the coal mining business, the classification thus attempted would be arbitrary and void. *Schus* v. *Powers-Simpson Co.*, 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887, 889.

This identical question was decided by the Supreme Court of North Carolina in *Twiddy* v. *Dare Lumber Co.*, 154 N. C. 237, 70 S. E. 282. The statute of that state provided that any employee of any railroad company who should be injured during his employment by the negligence of any other employee of the company might maintain an action against such company. The court held that the statute was applicable to a lumber company which operated a railroad in connection with its lumber business, to the extent that its employees were engaged in the operation of the company's railroad or any department of it. The court then said:

> "But this position, though fully established and sustained by these and many other decisions that could be cited, does not extend the effect of the fellow servant statute to employees of lumber companies who are in no way connected with the operation of these railroads. The act, in terms, uses the words 'railroad companies' and no other, and may not be applied to

employees who are engaged in the lumbering features of the business. In the case before us, as we interpret the testimony, the plaintiff was properly in the lumbering department of the business. So far as the evidence now discloses, he was not a part of the train crew, nor was he directly engaged in operating either the skidder or the loader, and, while he was at the time at work on a loading yard, he was, as stated, engaged in the lumbering features of the work, and could in no proper sense be considered an employee of a railroad or any department of it.

"We are of opinion, therefore, that the act in question has no application, and there was error in allowing the jury to determine the question of defendant's responsibility as in any way affected by it."

To the same effect see *Gurganous* v. *Camp Mfg. Co.*, 204 N. C. 525, 168 S. E. 833.

(3) The burden was upon appellee to allege and prove that appellant was a railroad company or a company engaged in mining coal, in order to bring his case within those provisions of the statute, and having alleged and established only that appellant is a corporation, his case must stand or fall upon the validity or invalidity of the statute as applied to all corporations.

None of the cases cited by appellee discusses the burden of proof in a matter of this kind. Some of those cases support the rule as stated by Mr. Justice BRANDEIS in *Heald* v. *District of Columbia*, 259 U. S. 114, 66 L. ed. 852, that "one who would strike down a state statute as violative of the federal constitution must show that he is within the class of persons with respect to whom the act is constitutional, and that the alleged unconstitutional feature injures him." There was no question in that case or in the other

cases cited as to the burden of proof. The facts were disclosed by the record and upon the facts as they appeared from the record the complaining party was not injured by the alleged unconstitutional feature of the statute. For example, in the *Heald* case a resident of the District of Columbia filed suit as committee of Peters, an insane person, also a resident of the District of Columbia, to recover certain taxes levied by Congress upon intangible properties of persons resident or engaged in business within the District. The Act of Congress was attacked on the grounds that it was invalid as to non-residents of the District and levied a tax upon bonds of states and their municipalities. The court held that, since the plaintiff was a resident of the District and the property on which the tax was levied did not include any state or municipal bonds, he was in no position to raise the question.

The cases cited by appellee would be applicable here only if the record affirmatively showed that appellant was a railroad company or a company engaged in mining coal.

Had such facts appeared in the record, this court might do as it did in *Aluminum Company* v. *Ramsey, supra*, and decline to pass on the constitutionality of the statute as applied to corporations, because in such case the court could say that the constitutionality of the statute as to corporations in general could not be raised by appellant.

The question here presented is where lies the burden of proof. Was the burden upon appellee to allege and prove that appellant was a railroad company or engaged in the mining of coal, or was it incumbent upon appellant to allege and prove that it was not engaged in either of those businesses? The question does not seem difficult of solution un-

der well settled principles. Appellee having brought this suit, it was necessary for him to allege and prove all facts necessary to establish a cause of action. *Garrett* v. *Louisville & Nashville R. Co.*, 235 U. S. 308, 59 L. ed. 242. If, as we contend, the statute is unconstitutional as applied to corporations in general, to that extent it is void and the situation is precisely as if the statute, by its express terms, applied only to railroad companies and companies engaged in mining coal. *Chicago, Indianapolis & Louisville Ry. Co.* v. *Hackett*, 228 U. S. 559, 565, 57 L. ed. 966, 969. This court, in that case, said:

> "That Act was therefore as inoperative as if it had never been passed, for an unconstitutional Act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."

If the statute had been limited to railroad companies and coal mining companies and the plaintiff had filed this suit, it would have been incumbent upon him to allege and prove that appellant came within one of those provisions.

—*Brinkmeier* v. *Missouri Pac. Ry. Co.*, 224 U. S. 268, 56 L. ed. 758;

United States v. *Perryman*, 100 U. S. 235, 25 L. ed. 645;

St. Louis, I. M. & S. Ry. Co. v. *Hesterly*, 98 Ark. 240, 135 S. W. 874;

Sandals v. *Mizpah Min. Co.*, 66 Okl. 233, 168 Pac. 808;

Zeller, McClellan & Co. v. *Vinardi*, 42 Ind. 232, 85 N. E. 378;

L. T. Dickason Coal Co. v. *Unverferth*, 30 Ind. App. 546, 66 N. E. 759;

5 Labatt on Master & Servant, p. 5812.

In *Brinkmeier* v. *Missouri Pac. Ry. Co., supra,* and in *St. Louis, I. M. & S. Ry. Co.* v. *Hesterly, supra,* it was held that, in an action under the Federal Employers' Liability Act, it was necessary for plaintiff to allege and prove facts sufficient to bring his case within the operation of the statute. In *L. T. Dickason Coal Co.* v. *Unverferth, supra, Zeller, McClellan & Co.* v. *Vinardi, supra,* and *Sandals* v. *Mizpah Min. Co., supra,* it was held that, in actions for injury or death under statutes applicable to coal mines where 10 men or more are employed, it is necessary to allege and prove that the coal mine in which the injured person was working was one in which 10 or more men were employed. The same rule is announced in 5 Labatt on Master & Servant, page 5812.

In *Garrett* v. *Louisville & Nashville R. Co., supra,* the Federal Supreme Court held, in an action by the parents for the death of their son under the Federal Employers' Liability Act, that the declaration was fatally defective where it contained no averment of pecuniary loss to the parents. The court said:

> "Where any fact is necessary to be proved in order to sustain the plaintiff's right of recovery, the declaration must contain an averment substantially of such fact in order to let in the proof. Every issue must be founded upon some certain point, so that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. * * *
>
> "The plaintiff's declaration contains no positive averment of pecuniary loss to the parents for whose benefit the suit was instituted. Nor does it set out facts or circumstances adequate to apprise the defendant with reasonable particularity that such loss in fact was suffered. Common experience teaches that financial dam-

age to a parent by no means follows as a necessary consequence upon the death of an adult son."

At common law the master was not liable for injuries to an employee caused by the negligence of a fellow-servant. *Northern Pac. R. Co.* v. *Peterson,* 162 U. S. 346, 40 L. ed. 994; *Graham* v. *Thrall,* 95 Ark. 560, 129 S. W. 532. And a complaint which shows that the negligence on which the cause of action is based was that of a fellow-servant is demurrable.

—*Ashley* v. *Hart,* 147 Mass. 573, 18 N. E. 416, 1 L. R. A. 355;

Central of Georgia v. *Lamb,* 124 Ala. 172, 26 So. 969;

39 C. J. 935, 940, and cases cited.

And *a fortiori* evidence which proves that the injury to the plaintiff was due to the negligence of a fellow-servant is demurrable.

The burden was therefore upon appellee to allege and prove that appellant was a railroad company or a coal mining company in order to have the advantage of those provisions of the statute. Having failed to allege or prove those facts, and they not otherwise appearing, and it appearing on the contrary that appellant was a corporation engaged in the oil business, the judgment in this case can be sustained only under that portion of the statute applicable to all corporations.

A very similar question was decided by this court in an opinion by Mr. Chief Justice TAFT, in *Samuels* v. *McCurdy, Sheriff,* 267 U. S. 188, 69 L. ed. 568. In that case Samuels brought suit against the sheriff to recover certain liquor and to enjoin the destruction thereof on the ground

that the statute of Georgia under which the liquor was seized was in violation of the Federal Constitution. A demurrer to the petition was sustained by the trial court and affirmed by the State Supreme Court. The statute authorized the destruction of the liquor upon order of the court. This court said:

> "The averment in the petition was that the sheriff intended to destroy the liquor. There is no averment in the petition that he did not intend to do this by order of court, upon his application. We must take it for granted on the demurrer, therefore, *as against the pleader,* that the sheriff did not intend to depart from Sec. 20 of the Act of 1915, *and that the question made here is on the validity of that section.*"

The court cannot say, as it did in some of the cases cited by appellee, that appellant is not within the class of persons with respect to whom the statute is unconstitutional. Appellant has shown that "it is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him." It has shown that the judgment in this case could only be sustained under the provision of the statute applicable to all corporations, and it has shown that the case was actually decided by the State Supreme Court upon that theory.

While we have discussed the burden of proof, we wish to state unequivocally that this is not a technical matter which counsel for appellee overlooked, but we wish to state distinctly that the appellant is not a railroad company, does not operate a railroad or a coal mine, either in Arkansas or in any other state. Moreover, counsel for appellee have not said and will not say the contrary.

(4) The Supreme Court of Arkansas having decided the case on the theory that only that portion of the statute applicable to all corporations was involved, and having upheld the same, the jurisdiction of this court cannot be avoided by showing that the case could have been decided upon other grounds. The contention now made by appellee was not so much as suggested to the Supreme Court of Arkansas. It was there contended that the constitutionality of the statute had not been raised in the proper time and manner and that the statute as applied to all corporations was valid, as had been many times held by the State Supreme Court. The contention of appellee is stated in the court's opinion, as follows:

> "The contention that said Act is unconstitutional is one of the grounds urged for a reversal of the judgment. *It is the contention of the appellee that this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea.*"

We have shown, under the decisions of this court and under the practice of Arkansas, the Supreme Court of that state could not properly have refused to decide the validity of the statute as to all corporations. Had it done so, the nonfederal ground of the decision would have been unsubstantial and this court would have jurisdiction to review the judgment.

—*Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 74 L. ed. 1023;

Brinkerhoff-Faris Trust & Savings Co. v. *Hill,* 281 U. S. 673, 74 L. ed. 1107.

But, assuming that the State Supreme Court could have ruled on the record before it that it was not required to pass

upon the constitutionality of the statute as to all corporations, it did not do so, but held the statute valid as to all corporations. The fact that the court could have avoided passing upon the constitutional question does not deprive this court of jurisdiction to review the judgment.

—*Ohio, ex rel. Clarke,* v. *Deckebach,* 274 U. S. 392, 71 L. ed. 1115;

First National Bank v. *Anderson,* 269 U. S. 341, 70 L. ed. 295;

Chicago, Rock Island & Pac. R. Co. v. *Perry,* 259 U. S. 548, 66 L. ed. 1056;

Miedreich v. *Lauenstein,* 232 U. S. 236, 243, 58 L. ed. 584, 589.

In *Miedreich* v. *Lauenstein; supra,* this court said:

"Where a state court holds that a federal question is made before it, according to its practice, and proceeds to determine it, this court will regard the question as duly made."

In *Ohio, ex rel. Clarke,* v. *Deckebach, supra,* the plaintiff petitioned the Supreme Court of Ohio for a writ of mandamus commanding the defendant, the auditor of Cincinnati, to grant him a license to conduct a billiard and pool room in that city. The petition alleged that plaintiff was a subject of the King of England and that he had been refused a license solely because he was not a citizen. It drew in question the validity of the city ordinance as violating a treaty between Great Britain and the United States and as denying the equal protection of the laws guaranteed by the Fourteenth Amendment. Defendant answered, traversing the allegation of citizenship and asserting that the ordinance was a reasonable police regulation passed in the interest of the public. On plaintiff's motion, the Supreme Court of Ohio

gave judgment on the pleadings, dismissing the petition. In an earlier case, it had held that the ordinance in question did not deny any rights guaranteed by the Federal Constitution. On the record before the court, the allegation that plaintiff was a subject of the King of England was denied. This court, in disposing of the contention that the plaintiff had not established that he was entitled to the benefit of the treaty, said:

> "At the outset defendant insists that plaintiff has not established that he is entitled to the benefit of the treaty since his allegation of citizenship is not admitted on the face of the pleadings. But the Supreme Court of Ohio has construed the pleadings as sufficient to draw in question the validity of the ordinance under the treaty. Hence we need not concern ourselves with those refinements of the local law of pleading which, it is said, enable defendant to justify his refusal to issue a license because of plaintiff's assertion of British citizenship, and at the same time deny that plaintiff has established citizenship entitling him to the protection of the treaty."

In *First National Bank* v. *Anderson, supra,* it was urged by motion to dismiss that this court was without jurisdiction because, although the state court decided the federal question, the judgment could be sustained on another ground, namely, that the suit was not one in which relief might be had in equity, there being an adequate remedy at law, etc. This court, in disposing of that contention, said:

> "The second ground is not better. The Supreme Court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

The case of *Chicago, Rock Island & Pac. R. Co.* v. *Perry, supra,* is even more conclusive. That case involved the validity of the "Oklahoma Service Letter Act." The Supreme Court of Oklahoma passed upon the constitutionality of the act and held it valid. In disposing of a motion to dismiss the writ of error, this court said:

> "Defendant in error moves to dismiss the writ of error on the ground that the constitutionality of the act was not really at issue; that the trial judge's instructions to the jury show that the only substantial question was whether the statements made in the letter actually given by the defendant were false and derogatory, and whether plaintiff had suffered damage thereby. But since the court of last resort of the state actually dealt with and passed upon the question raised by plaintiff in error as to the validity of the statute upon the ground of its being repugnant to the Constitution of the United States, and decided in favor of its validity, it is clear that, under the first paragraph of Sec. 237, Judicial Code, as amended by Act of September 6, 1916, Chap. 448, 39 Stat. at L. 726, Comp. Stat., Sec. 1214, Fed. Stat. Anno. Supp. 1918, p. 412, we have jurisdiction to pass upon the question, and the motion to dismiss must be denied. * * *
>
> "Again, in discussing the merits, defendant in error insists that the federal question is not necessarily involved; that the constitutional objection was waived when the company, instead of refusing to give a letter, of its own volition gave to Perry, upon his dismissal, a service letter which was false and derogatory, and which caused special damage that was pleaded and proved. At first blush, it seems somewhat strange for the company to aver that it acted under compulsion of a void statute, when what it did was contrary to the command of the statute; it almost looks as if it were merely held in damages for what ordinarily might be called a libel. *But the case cannot properly be dealt with upon*

this ground. The Supreme Court of Oklahoma not only passed upon the question of the constitutionality of the Service Letter Law, but deemed it necessary to pass upon it. So far as can be gathered from its opinion, there was no other legal ground upon which the judgment could be supported. Apparently, under the law of Oklahoma, apart from the statute, no legal duty was imposed upon the employer in such a case to speak the truth in a communication made respecting a discharged employee, nor was there other ground of liability for damages in case of its falsity. The statute is the essential foundation upon which the judgment rests, and we cannot find that the objections to its validity have been waived."

The Supreme Court of Arkansas having deemed it necessary to pass upon the constitutionality of the statute as applied to corporations, and having done so, the case is properly here.

PART II.

THE MERITS.

Statement of the Case.

This action was commenced by R. O. Jenkins as plaintiff, herein referred to as appellee, against Phillips Petroleum Company and Joe H. Myers in the Ouachita Circuit Court, Second Division, State of Arkansas, on June 16, 1934. The complaint alleged that Phillips Petroleum Company is a foreign corporation authorized to do business in the State of Arkansas and is engaged in the business of operating oil and gas wells, producing oil and gas, and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas; that on April 5, 1934, the appellee was in the employ of Phillips Petroleum Company in

connection with the operation of its oil and gas wells and pipe lines in the capacity of a laborer; that Joe H. Myers was also an employee of Phillips Petroleum Company and a fellow-servant of appellee; that on April 5th 1934, appellee, with other employees of appellant, was engaged under the direction of the foreman, Jim Forsyth, in stringing a 2½ inch gas line on appellant's Fleming Lease in Union County, Arkansas; that appellee and Joe H. Myers were engaged in carrying a joint of pipe to the place where other employees were stringing the pipe; that appellee was carrying one end of said pipe on his shoulder and Joe H. Myers was carrying the other end on his shoulder, appellee carrying the front end, with his back to Myers; that Myers carelessly and negligently, and without warning to appellee, shifted the joint of pipe from one shoulder to the other and thereby carelessly and negligently jerked on said joint of pipe, causing the appellee to lose his balance and step in a hole in the ground and fall, by reason of which he sustained injuries; that the injuries to appellee were caused solely on account of the negligence and carelessness of Joe H. Myers, and, at the time such acts of negligence were committed by Myers, he was a fellow-servant of the appellee. Appellee prayed damages in the sum of $75,000.00. (R. 3-7)

The answer of Phillips Petroleum Company admitted that it is a corporation, incorporated under the laws of Delaware and authorized to do business in Arkansas and is engaged in the production and transportation of oil in Union and Ouachita Counties, Arkansas. It admitted that appellee was in its employ and admitted that on the date in question he and Joe H. Myers were carrying a joint of pipe, the appellee carrying the front end, with his back to Myers, but

denied that Myers shifted the pipe from one shoulder to the other and denied that Myers jerked the same or in any manner caused appellee to step in a hole and fall. It denied that appellee sustained any injuries on account of any negligence of Myers, but alleged that, if appellee was injured, it was because of his own carelessness and negligence. (R. 7-10)

The evidence of appellee tended to substantiate the allegations of his complaint. (R. 17-44)

There was no controversy as to the facts material to this appeal. It was alleged by appellee and admitted by appellant that appellee and Joe H. Myers were fellow-servants, and the evidence established that fact beyond question. Both men were engaged in the same line of work, under the same foreman, and it was sought to hold appellant liable under the provisions of section 7137, Crawford & Moses Digest of the Statutes of Arkansas, although no reference to the statute was made in the pleadings.

The case was tried to a jury, and a verdict was returned in favor of appellee against appellant and Joe H. Myers for the sum of $50,000, upon which judgment was duly entered. (R. 10)

At the conclusion of all the evidence, appellant requested the court to direct a verdict in its favor, which was refused and to which appellant excepted. (R. 79) The court gave to the jury plaintiff's Instruction No. 1 (R. 81), which is quoted in Assignment of Error No. 2 hereinafter set forth. It told the jury, in substance, that appellant was liable for the negligence of Myers.

A motion for new trial was filed and overruled, and an appeal taken to the Supreme Court of Arkansas, where

that court modified and affirmed the judgment by reducing the amount to $30,000. (R. 87)

We have shown under Part I hereof that the question of constitutionality of Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, was drawn in question, and the statute was upheld by the State Supreme Court and that the cause comes to this court by appeal pursuant to the provisions of section 237 (a) of the Judicial Code (Title 28, U. S. C. A., Sec. 344 (a)).

There is considerable doubt as to whether there was any negligence of Myers and whether appellee was injured, but those questions have been foreclosed by the decision of the State Supreme Court, and the sole question presented in this appeal is whether the statute above mentioned is repugnant to the Fourteenth Amendment to the Constitution of the United States.

Specification of Assigned Errors to Be Urged.

1. The Supreme Court of Arkansas erred in holding that appellant's request for a peremptory instruction was properly refused by the trial court. The liability of appellant was based solely upon the alleged negligence of a co-employee and fellow-servant of appellee. Appellant was not and is not a railroad company nor engaged in the mining of coal, and would not have been liable under the laws of Arkansas but for that portion of section 7137, Crawford & Moses Digest of the Statutes of Arkansas which provides that "all corporations of whatsoever kind and character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant or employee.

Said portion of the statute is unconstitutional and void for the following reasons:

(a) It deprives appellant of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily discriminates against corporations by creating a liability of corporations to their employees for injuries sustained as the result of negligence of a fellow-servant, leaving individual and partnership employers engaged in the same business free of liability to their employees for injuries sustained under the same circumstances. The Supreme Court of Arkansas erred in refusing to so hold;

(b) It deprives appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily makes the fact of incorporation the basis of liability of employers for injuries to their employees resulting from negligence of co-employees and fellow-servants. The Supreme Court of Arkansas erred in refusing to so hold.

2. The Supreme Court of Arkansas erred in holding that the trial court properly gave to the jury Instruction No. 1, as follows:

"You are instructed that if you find from a preponderance of the evidence that plaintiff and defendant, Joe H. Myers, in the performance of their duties as employees of the defendant, Phillips Petroleum Company were carrying a joint of pipe as alleged in the complaint, the front end of said pipe resting on plaintiff's shoulder and the rear end of said pipe resting on the shoulder of the defendant, Joe H. Myers, and you further find from a preponderance of the evidence that the

defendant, Joe H. Myers, without warning, shifted said pipe from one shoulder to the other and jerked said pipe, and you further find that said shifting and jerking of said pipe without warning, constituted negligence, and you further find from a preponderance of the evidence that as the direct result of such negligence on the part of Joe H. Myers in so shifting and jerking said pipe without warning, plaintiff lost his balance and fell and was injured; and you further find that plaintiff was at the time in the exercise of ordinary care for his own safety, and had not assumed the risk, then you will find for the plaintiff and against both of the defendants."

Said instruction, insofar as it authorizes a verdict against appellant, was erroneous in that it made appellant liable in damages for an injury to the appellee as the result of negligence of a co-employee and fellow-servant and was based upon section 7137, Crawford & Moses' Digest of the Statutes of Arkansas. Appellant was not and is not a railroad company nor engaged in the mining of coal and is not liable under the laws of Arkansas for injuries sustained by an employee as the result of negligence of a co-employee or fellow-servant, except for that portion of section 7137, Crawford & Moses' Digest of the Statutes of Arkansas, which provides that "all corporations of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant, or employee. Said portion of the statute is unconstitutional and void for the following reasons:

(a) It deprives appellant of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily discriminates against corporations by creating a liability of corporations to their employees for injuries sustained as the result of negligence

of a fellow-servant, leaving individual and partnership employers engaged in the same business free of liability to their employees for injuries sustained under the same circumstances. The Supreme Court of Arkansas erred in refusing to so hold;

(b) It deprives appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily makes the fact of incorporation the basis of liability of employers for injuries to their employees resulting from negligence of co-employees and fellow-servants. The Supreme Court of Arkansas erred in refusing to so hold.

ARGUMENT.

Both assignments of error raise the same question of law and will be grouped for argument under the following proposition:

Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, in so far as it provides that "all corporations of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant, or employee, denies to corporations the equal protection of the law and deprives them of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The statute has been quoted *ante,* page 3. It makes all railroad companies and all companies whether incorporated or not engaged in the mining of coal and all corporations of whatsoever kind or character liable in damages for injuries or death sustained by any employee from the negligence

of any other agent, servant, or employee of said employer to the same extent as if the negligence was that of the employer. The effect is to abolish the common law fellow-servant rule as to those employers.

The above statute has been construed to apply to all corporations. *Soard* v. *Western Anthracite Coal & Mining Co.*, 92 Ark. 502, 123 S. W. 759. And not to apply to partnerships. *Graham* v. *Thrall*, 95 Ark. 560, 129 S. W. 532.

At common law the master was not liable for injuries to his servant caused by the negligence of a fellow-servant. *Northern Pac. R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994; *Graham* v. *Thrall*, 95 Ark. 560, 129 S. W. 532; 39 C. J. 537, and cases there cited. So, unless the rule has been changed by a valid statute, that is the law of Arkansas, in which case the court erred in giving appellee's Instruction No. 1 and in refusing appellant's request for an instructed verdict in its favor.

The validity of the statute is squarely presented in this case. Appellee's entire case, both under his complaint and under his evidence, is based upon the alleged negligence of Myers who is characterized by appellee both in his complaint and in his evidence as his fellow-servant. (R. 4, 24)

It is the contention of appellant that this statute deprives it of the equal protection of the law and of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it makes corporations liable for injuries without making individual and partnership employers engaged in the same business liable for injuries to their employees under the same circumstances. Liability is made to depend upon the *character* of the employer, an arbitrary classification not based upon a real and substantial difference having a reasonable relation

to the subject of the particular legislation. Let us illustrate the practical effect of the statute:

(1) A. and his wife are engaged in the retail clothing business as co-partners. A clerk in their store suffers a broken arm as the result of negligence of a co-employee and fellow-servant who overturns a ladder on which the clerk is standing. Under the law of Arkansas, A. and his wife are not liable for damages to the injured clerk. A few months later A. and his wife incorporate and continue to operate the same business as a corporation. The same employee is again injured in the same manner. The corporation, under the statute, can be made to respond in damages. The same business, operated by the same people, under the same circumstances, is liable in one case and not in another solely because of the fact that it was unincorporated when the first injury occurred and was incorporated when the second injury was sustained.

(2) A., a corporation, is engaged in drilling a well; a few hundred feet away B., an individual, is drilling a well. An employee of each is injured by the negligence of a fellow-servant. A. must compensate his employee but B. is not liable to his employee.

(3) A group of local men desire to prospect for oil and gas in the vicinity. Not wishing to risk their entire fortunes, and each wishing to contribute a certain amount to the venture, they incorporate a small company for the purpose of drilling a test well. A group of capitalists decide to drill a well in the same vicinity but do not incorporate. The two wells are located a few hundred feet from each other. They are drilled simultaneously; the same number of men work on each well; an employee at each well is injured by the negligence of a fellow-servant. The local company must

compensate its employee while the capitalists are not liable to their employee.

(4) A man and his family incorporate a small company and engage in a comparatively safe business, such as the merchandising of shoes. A group of wealthy men form a partnership and engage in the manufacture of nitroglycerin, where the hazard of injury to employees is great. An employee of each is injured by the negligence of a fellow-servant. The family corporation engaged in the comparatively safe business must compensate its employee while the wealthy partnership engaged in the extremely hazardous business is free of liability.

Examples could be multiplied indefinitely. But the above are sufficient to demonstrate the working of the statute and to prove the absurd and arbitrary character of the classification.

Such an unreasonable and arbitrary classification is prohibited by the Fourteenth Amendment to the Constitution of the United States. That amendment provides, in part:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Corporations are persons within the meaning of the above provisions.

—*Lake Shore, etc., R. Co.* v. *Smith,* 173 U. S. 690, 43 L. ed. 858;

Missouri Pac. R. Co. v. *Mackey,* 127 U. S. 209, 32 L. ed. 107;

Quaker City Cab Co. v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927;

Frost v. *Corporation Commission of Oklahoma,* 278 U. S. 516, 73 L. ed. 483.

We concede the right of the legislature to make reasonable classifications. We concede that the statute, insofar as it classifies all railroads and all coal mines, is a valid exercise of the police powers of the state. But, we contend that the statute, insofar as it places all corporations in a class regardless of the business in which they are engaged, is unreasonable and arbitrary. This court has repeatedly upheld the validity of statutes applicable only to railroads on the theory that the dangerous character and the public nature of the busines warrant separate treatment. In fact, this court has upheld the statute in question insofar as railroad companies are concerned. *Aluminum Co. of N. A.* v. *Ramsey,* 222 U. S. 251, 56 L. ed. 185. The Supreme Court of Arkansas had upheld the statute and applied it in that case, not because appellant was a railroad company, but because it was a corporation. This court, however, refused to uphold the statute on that ground, but held that the statute was specifically applicable to railroad companies and that appellant was a railroad company and the statute was valid as to it, and that it was in no position to question the validity of the statute as to other corporations.

The Supreme Court of Arkansas first upheld the statute in the case of *Ozan Lumber Co.* v. *Biddie,* 87 Ark. 587, 113 S. W. 796, and later in a number of other cases. But the *Ozan Lumber Company* case is the only one in which the court ever attempted to give any reason for its holding, other cases merely being decided on the authority of that one. In that case, the Ozan Lumber Company was a domestic corporation and the theory of the decision was that the state had reserved the right to amend the charters of corporations and that the statute amounted to such an amendment. The court conceded that, even in the case of domestic corpora-

tions, charters could be amended only upon terms that are just and reasonable. The reasoning of the court in holding the statute valid as to all corporations was as follows:

> "*Acts of Legislatures imposing such liability on railroad companies have been upheld by the courts on account of the hazardous character of the business of operating a railway. The only difference of the reason for such acts and the act in question is the danger of the service of railroads is greater than that of other corporations—a difference in degree, and not in kind.* We think the act in question is constitutional as to corporations."

It is apparent that the court's reasoning entirely missed the point. Its reasoning would, perhaps, be sufficient to uphold an act applying to all employers, but it fails utterly to justify an act applying to corporate employers only. Granting that the difference in the danger of any employment is only a matter of degree, the mere character of the employer as being incorporated or not has no bearing whatever on the situation. It was not the incorporation of railroads that justified their classification; it was the nature of the business conducted. The question for the court to determine is not whether the difference in the danger of the service of railroads and other corporations is one of degree, but whether there is any sound basis for making a distinction between corporations and individuals and partnerships engaged in the same business.

In *Aluminum Company of North America* v. *Ramsey, supra*, this court questioned the application of the holding of the Arkansas Supreme Court in the *Ozan Lumber Company* case to foreign corporations, in the following language:

"In *Ozan Lumber Co.* v. *Biddie, supra,* the court decided that 'the fellow-servant law' was an amendment to the charters of corporations, made under the right reserved in the Constitution of the state to repeal, alter, or amend such charters. *The Ozan Lumber Company, however, was a domestic corporation, and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local;* so we pass to the consideration of the merits."

In declining to pass on the validity of the statute as applied to all corporations, the court said:

"On the merits the case is in a very narrow compass and does not demand much discussion though plaintiff in error earnestly presses the contention that the statute is discriminatory in that it applies to all corporations, but does not apply to individuals or partnerships. *Whether that exact distinction, that is, the distinction merely between corporations and partnerships and individuals, is competent for a legislature to make, under its power of classifying objects, we are not called upon to decide.* The distinction made by the statute is broader. *The distinction* (among others) *it makes is between railroads operating in the state and individuals, and such distinction has been maintained by this court as not offendiny the Constitution of the United States.* (Citing authorities.)

"What grievance plaintiff in error might have if it were not operating a railroad, we are not called upon to consider, because it is limited in its complaint to the effect of the statute on it, and cannot appropriate the grievance that corporations engaged in mining, but not operating railroads; may have on account of the distinction made between them and individuals.

"It is true that the Supreme Court of the state, following Ozan Lumber Co. v. *Biddie, supra, decided*

the law was a regulation of corporations, and applied it to the plaintiff in error because it was a corporation, not distinguishing it as one operating a railroad. It, however, may be so distinguished under the statute. That is, the statute constitutes a class of corporations operating railroads, and under the cases we have cited the classification is valid, there being equality within the class. In other words, not only the plaintiff in error, but all other corporations operating railroads, are covered by the statute."

Statutes similar to the one in question have been condemned as violating the Fourteenth Amendment to the Constitution of the United States by the Supreme Court of Mississippi, the Supreme Court of Indiana, and the United States Circuit Court of Appeals for the Eighth Circuit.

—*Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476;

Bedford Quarries Co. v. *Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418);

Chicago, M. & St. P. R. Co. v. *Westby*, 102 C. C. A. 65, 178 Fed. 619.

The statutes condemned by the Mississippi and Indiana courts cannot be distinguished from the Arkansas statute. They purported to abrogate the common law fellow-servant rule as to all corporations. The statute condemned by the Circuit Court of Appeals purported to abrogate the common law fellow-servant rule as to all common carriers, a classification having a great deal more basis than that of all corporations. That court expressly approved the holding in the Mississippi case, referring to it in this language:

"Perhaps the most learned and exhaustive opinion upon *this question* is that of Chief Justice WHITFIELD in *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss.

507, 34 South. 533, 62 L. R. A. 407, 95 Am. St. Rep. 476. Support for the conclusion which has been reached may be found in that opinion and in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 155, 165, 17 Sup. Ct. 255, 41 L. ed. 666; * * * (citing other cases)."

The *Ballard* case was followed by the Mississippi court in *Bradford Construction Co.* v. *Heflin*, 88 Miss. 314, 42 So. 174, 12 L. R. A. (n.s) 1040, 8 A. C. 1077, where the court said:

> "And, so far as the contention that the *Ballard* case is unsound, is concerned, it is sufficient to remark, *first*, that that case was considered for two years by this court; *second*, that it was argued four times orally; *third*, that it received the concurrence of five of the judges of this court; *fourth*, that every argument that has been advanced now to show that the mere fact of incorporation was a defense was earnestly pressed in the argument of the *Ballard* case; *fifth*, that that case has stood as the law of the land for some years without question. It is simply waste of time to ask this court to overrule a case so thoroughly and patiently considered, and which has been so long established as the law of the land."

We shall refer to these cases at a later point in this brief.

There are no other cases that we know of involving the identical question before the court. There are, however, a number of decisions of this court, many of which are cited in the foregoing cases, which support our contention.

In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 112, 46 L. ed. 92, 109, this court, in condemning a statute of Kansas, limiting the charges of a stock yards company having average daily receipts of a certain number of cattle, hogs and sheep, said:

"But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, *and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other.* * * *

"This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the Supreme Court of Kansas in *State* v. *Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the 14th Amendment."

That decision would seem necessarily to condemn the statute in question. The statute places greater burdens upon corporate citizens than are placed upon individuals and partnerships engaged in the same business. We shall presently see that the fact of incorporation does not justify a classification of this kind.

In *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, a state statute imposing an attorney's fee upon railroad corporations omitting to pay certain claims within a certain time after presentation, which applied to no

other corporations or individuals, was held to deny to railroads the equal protection of the law. The court, no doubt, will want to read the entire opinion. It illustrates the principle that classification must have a reasonable relation to the subject of the particular legislation. It does not follow from the fact that railroads may be classified for purposes of abrogating the fellow-servant rule as to its employees that they may be classified for all purposes. And from the fact that corporations may be classified for some purposes, notably taxation, it does not follow that they may be classified for the purposes of making them liable for injuries to their employees.

In *Kentucky Finance Co.* v. *Paramount Auto Exchange*, 262 U. S. 544, 67 L. ed. 1112, it was held that a state statute requiring a foreign corporation filing suit in the state to appear in the state with its records and submit to examination, was invalid, there being no such requirement as to individual non-residents or as to residents. The court said:

> "No doubt a corporation of one state, seeking relief in the courts of another, must conform to the prevailing modes of proceeding in those courts, and submit to reasonable rules respecting the payment of costs or giving security therefor and the like (see *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553, 561, 64 L. ed. 713, 716, 40 Sup. Ct. Rep. 402); but it cannot be subjected, merely because it is such a corporation, to onerous requirements having no reasonable support in that fact, and not laid on other suitors in like situations. Here the statute authorized the imposition, and there was imposed on the plaintiff a highly burdensome requirement because of its corporate origin—a requirement which, under the statute, could not be laid on an individual suitor in the same situation. The discrimination was essentially arbitrary. There could be no reason for requiring a corporate resident of Louisville to send its

secretary, papers, files, and books to Milwaukee for the purposes of an adversary examination that would not apply equally to an individual resident of Louisville in a like case. The discrimination is further illustrated by the provision that, as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit.

"We hold that the statute, as it was applied in this case, was invalid, and the orders made under it were erroneous, as denying to the plaintiff the equal protection of the laws. This conclusion renders it unnecessary to consider the contention made under the due process clause."

In *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 71 L. ed. 1165, the Supreme Court held invalid a statute of Arkansas permitting a foreign corporation which had qualified to do business in the state to be sued in any county of the state, while suits against domestic corporations and individuals could be brought only in counties where they were found, or did business, or had a representative. The court said:

"We think it very plain that the statutes discriminate against foreign corporations and in favor of domestic corporations *and individuals*, and that the discrimination is not theoretical merely, but real and substantial.

"The clause in the 14th Amendment forbidding a state to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws (*Truax* v. *Corrigan*, 257 U. S. 312, 333, 66 L. ed. 254, 263, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124; *Atchison, T. & S. F. R. Co.* v. *Vosburg*, 238 U. S. 56, 59, 59 L. ed. 1199, 1200, L. R. A. 1915-E, 953, 35 Sup. Ct. Rep. 675), and extends as well to corporate as to natural persons. (Citing authorities.) It does not prevent a state from adjusting its legislation to differences in

situation or forbid classification in that connection; but it does require that the classification be not arbitrary, but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. (Citing authorities.)

"No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, *the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.*

"Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. The statutes mean foreign corporations doing business within the state by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course, the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a state-wide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."

Most conclusive is the case of *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927. There a gross receipts tax was levied upon all *corporations* operating taxicabs. In holding the statute invalid, and after reviewing the authorities, the court said:

> *"Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises.* It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else.
>
> *"In effect Sec. 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed.* It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Mfg. Co.* v. *Saunders, supra.* No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the 14th Amendment. See, *Railroad Tax Case,* 8 Sawy. 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.,* 9 Sawy. 165, 18 Fed. 385; *Northern P. R. Co.* v. *Walker,* (C. C.) 47 Fed. 681. The tax cannot be sustained."

In *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 516, 73 L. ed. 483, the court held that a statute which made cotton gins public utilities and required a showing of public necessity for a license to operate, but which permitted certain co-operative corporations to obtain a license without a showing of public necessity, deprived an individual, who had made a showing of public necessity, and obtained a license, of the equal protection of the law. The court said:

> "Is, then, the effect of the proviso to deny appellant the equal protection of the laws within the meaning of the 14th Amendment? As the proviso was construed and applied by the commission and by the court below, its effect is to relieve all corporations organized under the Act of 1919 from an onerous restriction upon the right to engage in a public business which is imposed by the statute upon appellant and other individuals, as well as corporations organized under general law, engaging in such business. That a greater burden thereby is laid upon the latter than upon the former is clear. Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Natural Gas Co.* v. *Arkansas R. Commission*, 261 U. S. 379, 384, 67 L. ed. 705, 710, 43 Sup. Ct. Rep. 387, and cases cited.
>
> "*The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. Louisville Gas & E. Co.* v. *Coleman*, 277 U. S. 32, 37, 72 L. ed. 770, 773, 48 Sup. Ct. Rep. 423. This court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 400, 72 L. ed. 927, 929, 48 Sup. Ct. Rep. 553; *Kentucky Finance*

Corp. v. *Paramount Auto Exch. Corp.*, 262 U. S. 544, 550, 67 L. ed. 1112, 1115, 43 Sup. Ct. Rep. 636; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154, 41 L. ed. 666, 667, 17 Sup. Ct. Rep. 255. The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, ' "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415, 64 L. ed. 989, 990, 40 Sup. Ct. Rep. 560; *Air-way Electric Appliance Corp.* v. *Day*, 266 U. S. 71, 85, 69 L. ed. 169, 177, 45 Sup. Ct. Rep. 12; *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 240, 70 L. ed. 557, 564, 43 A. L. R. 1224, 46 Sup. Ct. Rep. 260. That is to say, MERE difference is not enough; the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255.' *Louisville Gas & E. Co.* v. *Coleman, supra*, p. 37 (72 L. ed. 773, 48 Sup. Ct. Rep. 423). * * *

"Stripped of immaterial distinctions and reduced to its ultimate effect, the proviso, as here construed and applied, badly creates one rule for a natural person and a different and contrary rule for an artificial person, notwithstanding the fact that both are doing the same business with the general public and to the same end, namely, that of reaping profits. That is to say, it produces a classification which subjects one to the burden of showing a public necessity for his business, from which it relieves the other, and is essentially arbitrary, because based upon no real or substantial differences having reasonable relation to the subject dealt with by the legislation. Power Mfg. Co. v. *Saunders*, 274 U. S.

490, 493, 71 L. ed. 1165, 1167, 47 Sup. Ct. Rep. 678; *Louisville Gas & E. Co.* v. *Coleman,* 277 U. S. 39, 72 L. ed. 774, 48 Sup. Ct. Rep. 423; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 402, 72 L. ed. 930, 48 Sup. Ct. Rep. 553."

As before pointed out, the theory of the Supreme Court of Arkansas in upholding the statute has always been that the reserved power to amend charters of corporations authorized the legislation in question. The court does not attempt to justify the legislation by the police power of the state. In fact, the court, in an earlier case, held that a statute regulating the time of payment of wages of employees was invalid as to individuals but valid as to corporations because of the reserved power to amend their charters. *Leep* v. *St. Louis, I. M. & S. Ry. Co.* 58 Ark. 407, 23 L. R. A. 264. In that case the court questioned whether the Fourteenth Amendment to the Federal Constitution was applicable to legislation amending charters of corporations. Perhaps that is the reason the State Supreme Court has never seen fit to discuss the reasonableness of the classification made by the statute. It is apparent that that court has labored under the impression that the powers of the state were considerably greater under its reserved power to amend charters of corporations than under the police powers of the state. In that we think the court was mistaken. As before pointed out, this court questioned whether the reserved power in a state to amend corporate charters was applicable to a foreign corporation. *Aluminum Company of North America* v. *Ramsey, supra.* Other courts have held that it was not. *Bedford Quarries Co.* v. *Bough,* 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418, and cases cited. However, it seems clear that, whether applicable here or not, there is no greater power in the right reserved to amend corporate charters than in the

police powers. Under either theory the state may make such classification as is based upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed, but arbitrary selection cannot be justified by calling it classification. *Southern R. Co.* v. *Greene,* 216 U. S. 400, 54 L. ed. 536; *Cotting* v. *Kansas City Stock Yards Co.,* 183 U. S. 79, 46 L. ed. 92, 108; *Connolly* v. *Union Sewer Pipe Co.,* 184 U. S. 540, 46 L. ed. 679, 690; *Lake Shore & Mich. So. Ry. Co.* v. *Smith,* 173 U. S. 684, 43 L. ed. 858, 864; *Stearns* v. *Minnesota,* 179 U. S. 223, 45 L. ed. 162; *Chicago, M. & St. P. Ry. Co.* v. *Wisconsin,* 238 U. S. 491, 59 L. ed. 1423, L. R. A. 1916A, 1133. In the last three cited cases it was urged that the statute could be justified under the reserved power of the state to amend corporate charters. In the *Lake Shore* case a state statute fixing rates of railroads provided that thousand-mile tickets should be sold at reduced rates. The court held the statute invalid. With respect to the power to amend corporate charters, the court said:

> "The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend, or repeal the charter thereof. The power to alter or amend does not extent to the taking of the property of the corporation either by confiscation or indirectly by other means."

The *Stearns* case involved the right of the state to abrogate a contract with the railroad for 3 per cent of the gross earnings in lieu of all other taxes. Speaking of the reserved power of the state to alter corporate charters, the court said:

> "But whilst this is settled, it has also been equally

determined that the reserved right to repeal, alter, or amend does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by depriving of the equal protection of the laws or of the constitutional guaranty against the taking of property without due process of law."

In the *Chicago, M. & St. P. R. Co.* case the court considered a statute prohibiting the letting down of an unengaged and unoccupied upper berth in a sleeping car when the lower berth in the same section was occupied. The court held the act arbitrary and void and that the reserved right of a state to amend corporate charters cannot be exercised so as to take property of a corporation without due process of law.

Thus it is seen that there is no magic in the reserved power to amend corporate charters, and that the state has no greater power under its reserved power to amend corporate charters than it has under its police powers. The validity of the statute turns upon whether it is reasonable or arbitrary in its classification.

Adverting now to the case of *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 So. 533, 62 L. R. A. 407, 95 A. S. R. 476 (1903), where the identical question before this court was carefully and exhaustively considered, the authorities reviewed at length, and the conclusion reached that the statute was unconstitutional.

The Mississippi statute provides:

"Every employee of any corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employees, as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party in-

jured; and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employe injured of the defective or unsafe character or condition of any machinery, ways, or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers, in charge of dangerous or unsafe cars, or engines, voluntarily operated by them."

In discussing the constitutionality of the statute, the court said:

"We do not understand the Supreme Court of the United States, in its many decisions on this subject, to mean that the dangerousness of a particular business would be the only basis for distinguishing between the businesses of corporations or individual employers in the classification, but rather that any substantial difference between particular businesses which would serve as a reasonable basis for a classification, allowing the employees in the one case to recover, and in the other case not, is sufficient. This we understand to be the doctrine of the *Ellis* case, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and of the *Magoun* case, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594, and of *St. Louis, I. M. & S. R. Co.* v. *Paul,* 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, in which last case the differences was held to consist in the fact that the corporation was engaged in a public business, and that *the public character of that business made a sufficient difference for upholding that statute.* Whilst this case seems an extension of the doctrine of the *Mackey* case, it is clearly an application of the same principle. *Neither held that the employees of all corporations could be given this right to recover.* One held that the employees of a railroad corporation might be given the right to recover because of the dangerous character of that busi-

ness; the other, that the employees might recover, under the Arkansas statue involved, because 'of the fact that these corporations (railroad) were clothed with a public trust, and discharged duties of public consequence affecting the community at large;' it being said, following the Supreme Court of Arkansas, that 'the regulation, as promoting the public interest in the protection of employees, to the limited extent stated, * * * (was) properly within the power to amend reserved under the State Constitution.' It will be observed that this decision is criticised as pressing the doctrine beyond its utmost legal tension, in a note of Mr. Freeman to this same case at the top of page 181, 62 Am. St. Rep.; but the criticism should be rather of the Supreme Court of Arkansas than of the United States Supreme Court, as we shall show later herein.

"The act of 1898 under review is assailed as violating the Fourteenth Amendment of the Constitution of the United States, because it denies—as alleged—to corporations the equal protection of the laws in two respects: *First,* in that it applies to the employees of all corporations, without reference to any differences in the respective businesses of the corporations; *second,* because it discriminates between employees of natural persons and of corporations, and the argument is put briefly thus by way of illustration: 'Suppose one man has an independent fortune, and has a large body of pine land, say in Clarke County, Mississippi, and being desirous of converting the timber upon these lands into lumber, and recognizing that the sawmill business is hazardous, and likely to impose large liability upon him, he incorporates this business under the name of the Clarke County Sawmilling Company. Alongside of him and his property in Clarke County is an individual owning an equal body of land, who does not see fit to take this precaution. Suppose the boilers of these two sawmills are notoriously weak, and all the employees of both parties are aware of it, and yet they continue to work. Suppose, now, at the same time and from identi-

cally the same cause a boiler explosion takes place in both mills. The Clarke County Sawmilling Company would, under the act of 1898, be mulcted in damages, but the individual would not be liable.' And it is urged that the act applies to all corporations, but to no natural persons, and, *since the natural person and the corporation might be both engaged in precisely the same business, a discrimination in such cases does not rest on any difference in the business.* Possibly the clearest statement of the doctrine contended for by appellee is that stated in *Soon Hing* v. *Crowley,* 113 U. S. 708, 709, 28 L. ed. 1146, 1147, 5 Sup. Ct. Rep. 733, as follows: '*The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws.*' In the *Ellis* case, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, it is said that the classification must always rest upon 'some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily.'

"Multiplied citations from the United States Supreme Court could be made, but the thought running through them all, as we understand them, clearly is that *the classification is not to be made, except upon the basis of some difference between the business of those favored and the business of those not favored—a substantial difference warranting the classification.* We have read critically all the decisions cited in the briefs from the United States Supreme Court without finding any decision holding expressly that a statute providing that the employees of all corporations may so recover can be upheld. We have read carefully, also, the decisions from the State Supreme Courts cited, and others not cited, by counsel. * * *

"We must confess that the argument upholding the constitutionality of the statute before us is exceptional-

ly able, and presents many objections to the view we have stated, but objections all of which we think answerable. • • •

"*Second.* In respect to the cases of *Pittsburgh, C. C. & St. L. R. Co.* v. *Montgomery,* 152 Ind. 1, 49 N. E. 582, and *Tullis* v. *Lake Erie & W. R. Co.,* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, it is very earnestly insisted that the *Tullis* case, 175 U. S. 350, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, upholds the view that a statute like this, applicable to all corporations, is not unconstitutional; and it is said that these two cases further uphold the view that the court may, by a process of judicial inclusion and exclusion, look to the evidence in each case to determine in that way—from the evidence, showing the nature of the business—whether any particular corporation falls within or without the constitutional line of demarkation. • • •

"We, however, think the meaning of the *Tullis* case is, distinctly, that if the Indiana statute had not had in it, on its face, the words 'railroad corporations', it would have been held by the Supreme Court of the United States unconstitutional. It is true the objection in that case was made that it was unconstitutional because the language, 'railroad corporations and other corporations,' was exactly equivalent to the words 'all corporations,' which would present a statute just like ours. But it is to be distinctly noted that the Indiana Supreme Court held, and the United States Supreme Court counted on that holding, that that objection could not be made by a railroad company; in other words, the Indiana Supreme Court declined to entertain the objection, since the party making the objection was a railroad corporation, and the Supreme Court of the United States accepted the State Supreme Court's construction of its State's statute. The words 'railroad corporation' appearing also on the face of the statute, as to the objection that individuals own railroads, and that, consequently, the Supreme Court of the United States in the *Tullis* case, 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct.

Rep. 136, must be assumed to have held that such legislation is valid, though applying to corporations owning railroads, and not to individuals owning railroads, although both are in exactly the same business, we must confess that it is extremely difficult to make answer for the Supreme Court of the United States. It may be that the instances of individual ownership of interests so vast as railroad interests usually are so very rare as not to have been thought worthy by the Supreme Court of the United States of special consideration, though this surely ought not to affect the principle. *At all events, it is too plain for debate that in all the decisions of the Federal Supreme Court the ground on which such legislation as this has been vindicated is some essential and substantial difference between the businesses of the corporations favored and the businesses of the corporations discriminated against.* * * *

"*Fifth,* it is objected that the United States Supreme Court decisions would uphold this statute upon the ground that it is perfectly competent to confer upon the employees of all corporations these remedies and rights, whilst denying them to natural persons, because, and only because of the fact that they are corporations, the creatures of the state, existing and drawing all their vast privileges from the state. It is said that these considerations constitute such a great difference between the natural person and the corporation as to uphold such legislation. And the *Ellis* case, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, is cited; the court saying there that it was a sufficient answer, in that case, to the argument that the act would be valid if it extended the penalties to all corporations, and that as a matter of fact that statute did not so extend the penalties to all corporations. But this is far from decision to that effect. It is a mere comment *arguendo.*

"Again, it is said that in *Pacific Exp. Co.* v. *Siebert,* 142 U. S. 352, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, it was held that 'the Constitution is not violated by special legislation, applied equal-

ly to artificial bodies'; and numerous cases are cited from Judge Rose's notes on this case to sustain this proposition. But the perfect answer to this is that all these are cases as to the power of taxation, a subject wholly different from that under investigation here. And this distinction is clearly pointed out in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 562, 46 L. ed. 691, 22 Sup. Ct. Rep. 440, where the court says: 'It is sufficient to say that those cases had reference to the taxing power of the state, and involved considerations that could not, in the nature of things, apply to a state enactment like the one involved in the present case. * * * A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States so long as the classification does not invade the rights secured by the Constitution of the United States. But different considerations control when the state by legislation seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade.' * * *

"Our conclusion, after the most careful and protracted consideration, is that Sec. 1 of the act of 1898 (Acts 1898, Chap. 66, p. 85) violates the 14th Amendment of the Constitution of the United States, in that it imposes restrictions upon all corporations, without reference to any difference arising out of the natures of their businesses, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the law. We are, therefore, constrained to declare the said act unconstitutional. The Legislature, soon to meet, can readily frame an appropriate act not open to these objections."

The above case was cited and followed by the Supreme Court of Indiana in *Bedford Quarries Co.* v. *Bough*, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (n.s.) 418. The court said:

"The portion of Sec. 7083, *supra*, upon which the third paragraph of the complaint is based, reads as

follows: 'That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: * * * *Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee, at the time of the injury, was bound to conform and did conform.' It is urged by appellant that said employer's liability act, except as applied to railroads, is in violation of the 14th Amendment of the Constitution of the United States, and therefore void, for the reason that it imposes burdens upon private corporation employers that are not imposed on individual and co-partnership employers in the same business under the same circumstances and conditions, and gives a right of action to the employees of private corporations that is not granted to the employees of individuals and co-partnerships under like conditions. Appellee insists that the Legislature has the power of classification for legislative purposes, and that the classification in said act was proper.

"The Legislature may make a classification for legislative purposes, but it must have some reasonable basis upon which to stand. It is evident that differences which would serve for a classification for some purposes would furnish no reason for a classification for legislative purposes. Such legislation must not only operate equally upon all within the class, *but the classification must furnish a reason for and justify the making of the class;* that is, the reason for the classification must inhere in the subject-matter, and rest upon some reason which is natural and substantial, and not artificial. Not only must the classification treat all brought under its influence alike, under the same conditions, but it must embrace all of the class to which it is naturally related. Neither mere isolation, nor arbitrary selection, is proper classification. (Citing authorities.) * * *

"While the employer's liability act, so far as it affects private corporations, applies to all within the class named therein, it does not include all of the class to which it is naturally related. Employees of individuals and co-partnerships are excluded from the benefit of its provisions. It gives a right of action to an employee for injuries received while in the service of a private corporation in certain cases, but denies the employee of an individual or co-partnership engaged in the same business a right of action for an injury arising from the same cause and under the same conditions. *It imposes new burdens on private corporations, while natural persons carrying on a like business and under like circumstances and conditions are left without any such burden. The right of action is made to depend upon the character of the employer, and not upon the character of the employment.* In *Ballard* v. *Mississippi Cotton Oil Co., supra*, 'a statute providing that every employee of any corporation shall have the same rights and remedies for an injury suffered by him from an act or omission of the corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior agent or officer, or of a person having the right to direct or control the services of the person injured, and also when the injury results from the negligence of a fellow-servant; and that knowledge of defective appliances by the person injured shall constitute no defense; and that the provisions of the statute shall not be waived by contract (was held) unconstitutional, because it imposes restrictions on all corporations, without reference to any difference arising out of the nature of their business, which are not imposed upon natural persons, and thus denies to corporations the equal protection of the laws.' * * *

"It cannot be denied, however, that in present industrial conditions the co-servant doctrine, which had for its basis, to some extent at least, the idea that the servant could know and estimate the character of his

associates, and that the safety of the common service was promoted by placing that burden on him (Pollock, Torts, pp. 95, 96; Pollock's Essays on Jurisprudence, p. 141; *Farwell* v. *Boston & W. R. Corp.*, 4 Met. 49, 58, 59, 38 Am. Dec. 339, 342, 343), has, when applied to the facts in many cases, become arbitrary, rather than a reasonable rule of law. * * *

"In view of this, everyone must realize that there is a reasonable ground for the essential idea of the employer's liability legislation; *but the fact must not be forgotten that the small industry still exists, and that, under the convenient form of corporate capacity, men still carry on industrial undertakings which are in no essential particular different from those which are carried on by co-partnerships and individuals. It is this fact which makes a classification on the basis of the character of the employer inherently vicious.* True, the corporation under our laws and industrial system, has in it the seeds of tremendous growth; but, as the real evil can be reached by a classification which goes to those elements which, to some extent, have removed the reason for the co-servant rule, *there is not even a color of an excuse for imposing burdens on the corporate employer, while its competitor, a natural person, who is carrying on, under the same conditions, like business, is left without any such burden.* If said corporations, as such, are to have legislative burdens put upon them, as by the law in controversy, then all who ought to be put in their class should be included, or, if this appears to the legislative mind as improper owing to differences in the character of employments, then legislation should have for its basis a classification which rests on such diferences in the various employments as would make a distinction between them appear to be warranted. * * *

"It is claimed, in effect, that the employer's liability act must be treated as an amendment of the law or laws under which railroad and other corporations are organized in this State, and that, when so treated, appellant cannot, if a domestic corporation, object to

the same. Said employer's liability act has been held to apply not only to railroad corporations proper, but to apply to other kinds of corporations, as well as individuals, engaged in the business of operating railroads. *Pittsburgh, C. C. & St. L. R. Co.* v. *Lightheiser*, 168 Ind. 438, 78 N. E. 1033. The words 'other corporations,' used in said act, not only apply to private corporations existing under the laws of this State, but to foreign corporations doing business in this State and in no way indebted to this State for their charters. *The Legislature of this state has no power to alter, amend, or repeal the charter of a foreign corporation, or the law under which it is organized. It is evident, therefore, that said act cannot be regarded as an amendment of the different incorporation laws of this State. Missouri, K. & T. R. Co.* v. *Medaris*, 60 Kan. 151, at page 156, 55 Pac. 875; note to *St. Louis, I. M. & S. R. Co.* v. *Paul*, 62 Am. St. Rep. 181; *Johnson* v. *Goodyear Min. Co.*, 127 Cal. 4, 47 L. R. A. 338, 344, 78 Am. St. Rep. 17, 29-31, 59 Pac. 304. See, also, *State* v. *Haun*, 61 Kan. 146, 149-152, 47 L. R. A. 369, 59 Pac. 340."

In *Chicago, M. & St. P. Ry. Co.* v. *Westby*, 178 Fed. 619, 102 C. C. A. 65, the Eighth Circuit Court of Appeals held invalid a statute of South Dakota, in effect abrogating the fellow-servant rule and providing that contributory negligence should not be a defense but should diminish the damages in case of injury or death of an employee of "every common carrier engaged in trade or commerce in the State of South Dakota." The court held that the term "common carrier" embraced railroads, express companies, telegraph, telephone, omnibuses, cabs, drays, trucks, sleds, boats, and many other vehicles, and that the classification was arbitrary. The court discussed the principles involved at length and cited with approval the case of *Ballard* v. *Mississippi Cotton Oil Company, supra.* While the question de-

cided is not the exact question here, the same principles are involved, and, in fact, that case goes much farther than required in the present case.

Conclusion.

Appellee's whole case is based upon the alleged negligence of a fellow-servant. We believe that we have conclusively demonstrated that the statute upon which the action is based is unconstitutional. This cause should therefore be reversed and remanded with instructions to dismiss.

Respectfully submitted,

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Counsel for Appellants.

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No. 386

In the Supreme Court of the United States

October Term, 1935.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

REPLY BRIEF OF APPELLANTS.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1935.

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants,*

vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

REPLY BRIEF *of* APPELLANTS.

We shall adhere to the arrangement of our original brief by dividing this brief into two parts, Part I dealing with the jurisdiction of this court and Part II with the merits of the case.

PART I.

Jurisdiction.

It is contended by appellee that it is not necessary for this court to decide the constitutionality of section 7137, Crawford & Moses' Digest of the Statutes of Arkansas,

for the reason that there is another statute, section 7144 of the same Digest, which is in substance the same as section 7137, and which section has not been drawn in question and its validity has not been determined by the Arkansas Supreme Court. Passing the novel suggestion that the jurisdiction of this court can be avoided by showing that the state Supreme Court failed to mention a statute not distinguishable from the one adjudged valid, it is sufficient to say that the state Supreme Court treated section 7137 as the statute applicable to the facts of this case and based its decision upon the validity of that statute. Assuming that the state court could have avoided a decision of the constitutionality of section 7137 by merely saying that section 7144 was also applicable and its validity had not been challenged, it did not do so, and it is not for this court to say that the state Supreme Court need not have decided the constitutionality of section 7137. The authorities cited on page 29 of appellants' original brief are applicable. See also *Nickey* v. *Mississippi*, 292 U. S. 393, 78 L. ed. 1323, and *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. ed. 565, cited and quoted on page 10 of appellants' original brief. Moreover, we have never heard of a court refusing to pass upon the constitutionality of a certain statute because of the fact that there existed another statute not distinguishable in its application which had not been specifically challenged. The suggestion that a court would do such a thing is an imputation that courts are more hypertechnical than we have any reason to believe they are in these modern times. If one of the statutes is unconstitutional the other is also, and, rather than avoid passing upon one because the other had not been specifically challenged, it is probable that the court would either do as the Arkansas court did here and treat

the one statute as the applicable one and pass upon its validity, or uphold or nullify both statutes. Counsel for appellee did not suggest to the Supreme Court of Arkansas that it was not necessary to decide the validity of section 7137 because of the fact that section 7144 was not challenged, but, as stated by the state Supreme Court, they contended that the validity of section 7137 should not be determined because of the fact that "this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea." (R. 89, 90, appellants' original brief, pages 7 and 8.) The proper place to have raised that question was in the state court and not here.

Moreover, there is ample reason why the state Supreme Court could not have said that section 7144 was applicable to the facts of this case, and that is because the act, by its express terms, is applicable to every corporation "except while engaged in interstate commerce." It may be that the state court, if the question had been presented to it, would have said that it could not say from the record before it that appellant was not engaged in interstate commerce. Certainly there is no evidence that it was not, and plaintiff's complaint does not allege that it was not. If he had intended to rely upon that section of the statute, *it would have been incumbent upon him to allege that appellant was a corporation not engaged in interstate commerce.* Section 7137 is the only statute applicable to the issues formed by the pleadings and the evidence, and only that portion of that statute relating to "all corporations of every kind and character" is applicable. Moreover, all parties and the state courts treated that statute as the only applicable one, and

it was suggested in this court for the first time that section 7144 might have been applied. That the decision of the state Supreme Court would have been the same had section 7144 been considered applicable and challenged is conclusively shown by the fact that the court, in sustaining section 7137, cited its own decision in the case of *Postal Telegraph-Cable Co.* v. *White,* 190 Ark. 365, 80 S. W. (2d) 633, upholding section 7144 as against the contention that it violated the Fourteenth Amendment to the Constitution of the United States. (R. 90; and see quotation from *Postal Telegraph-Cable Co.* v. *White,* page 8, appellants' original brief.)

Appellee next contends that the constitutionality of section 7137 is not properly before this court because appellant did not affirmatively show that it was not a railroad company or a company engaged in mining coal. This contention is fully answered, we think, in appellants' original brief, pages 17 to 32. *It is significant that appellee does not undertake to answer the contention made in appellants' brief, pages 28 to 32, to the effect that the State Supreme Court, having decided the case on the theory that only that portion of the statute applicable to all corporations was involved and having upheld the same, the jurisdiction of this court cannot be avoided by showing that the case could have been decided upon other grounds.*

Counsel for appellee concede that, in the cases cited by them in support of the rule that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional, the records disclosed that the appellants were not within that class. But they contend

that nevertheless the rule announced by the court included all cases where the appellant was not within the class whether the record disclosed that fact or not. But courts act only upon records. *The record does disclose in this case, that appellant is a corporation and that judgment was rendered against it in this case solely by reason of that fact.* It therefore is within the class entitled to challenge the validity of that portion of the statute applicable only to corporations.

Perhaps a great deal of the difference between appellant and appellee upon the question of whether or not the record must affirmatively show that appellant is not a railroad company or engaged in mining coal will disappear when it is once determined whether or not plaintiff's action was based upon the statute, as appellant contends, or was based upon the common law, as appellee contends. His counsel say:

> "Appellee's cause of action was not created by Section 7137 of Crawford & Moses' Digest, his cause of action against appellant is founded upon the ancient doctrine of *respondeat superior.*"

They quote from McKinney, Fellow Servants, paragraph 4, page 4, to the effect that the ancient rule of *respondeat superior* was applied without exception until 1837, when *Priestly* v. *Fowler* was decided and the history of the fellow-servant rule began. They further say that the fellow-servant rule is a part of the doctrine of assumed risk and that assumption of risk is an affirmative defense which is not available to a defendant unless specially pleaded.

It seems immaterial how or when the doctrine of the fellow-servant rule originated. It is sufficient that for almost a century it has been the law of the land, in the ab-

sence of a statute, that the master is not liable for injuries to his servant due to the negligence of a co-employee. Appellee cannot very well rely upon the *ancient* rule of *respondeat superior* for his case was not tried in ancient times. The rule of *respondeat superior* did not apply to the facts as alleged and proved by appellee in this case, and, but for the statute in question, the court undoubtedly would have instructed a verdict for the appellant, as was done in *Graham* v. *Thrall*, 95 Ark. 560, 129 S. W. 532, where the action was against a partnership. The court said:

> "It has been usually held that one of the ordinary risks incident to the employment and one assumed by the servant is the negligence of a fellow servant. But whether based upon that ground or from other reasons the rule of law is well settled that a master is not bound to indemnify one servant for injuries caused by the negligence of a fellow servant. This rule has been modified in this state by the Act of the Legislature of March 8, 1907 (Acts 1907, p. 162), *when applied to a corporation* employing servants, *but this act does not affect this rule when the employers, as in the case at bar, are the individual members of a partnership.*"

In *Kansas City, Ft. S. & M. Ry. Co.* v. *Becker*, 63 Ark. 477, 39 S. W. 358, in an action for personal injuries due to an insecure step upon a railroad engine, the court said:

> "Upon the plaintiff devolved the burden of proving his cause of action. The fireman and engineer were in the common service of the defendant, working together to a common purpose, in the same department, as shown by the evidence. The presumption is they were fellow servants; *and it devolved on the plaintiff to show that they were not, in order to make the defendant liable to him for the damages he suffered from the negligence of the engineer.*"

That case conclusively establishes the rule that the burden is upon the plaintiff, in order to make out a case for personal injuries against an employer, to show that the person whose negligence caused the injuries was not his fellow-servant. In the case at bar, of course, that fact could not be shown because it is alleged by plaintiff that he was injured through the negligence of the defendant Myers who was specifically alleged to be his fellow-servant. He therefore stated no cause of action unless the statute gave him one under the facts alleged.

In 39 C. J. 939, the following rule is stated:

> "On the other hand, where the negligence is charged as that of a servant, *or it appears affirmatively on the face of the pleading that the act or omission causing the injury was that of a fellow servant, or where, under the facts stated, the injury might have resulted from the negligence of a fellow servant, plaintiff must allege, or state facts showing, that he and such servant were not fellow servants,* or that defendant was negligent in employing such servant, or retained him after he knew, or ought to have known, that he was incompetent."

Among the cases cited in support of the text is *Roberts & Shafer Co.* v. *Jones,* 82 Ark. 18, 101 S. W. 165, where it was recognized that if the complaint had shown that the negligence was that of a fellow-servant no cause of action would have been stated. But the court held in that case that the complaint was sufficient, in the absence of a motion to make definite and certain. The complaint alleged that "the defendant, through its foreman in charge of said work, * * *" committed an act of negligence. The court said:

> *"The complaint is defective in that it does not allege that the foreman was a vice principal of the master, and not a fellow servant of the plaintiff;* but it

> should have been met with a motion to require it to be made more definite and certain."

That case is to be distinguished from the one at bar in that negligence on the part of the defendant was charged and it was not alleged that the agent who committed the negligent act was a fellow-servant. It is clear that had the complaint so alleged the court would have said that no cause of action was stated. It was only the fact that it was not shown whether the agent was a vice-principal or a fellow-servant, together with the allegation that the negligent act was that of the defendant, which saved the complaint. In the case at bar no allegation of negligence against appellant was made. It was charged that the negligence was that of Joe H. Myers and that he was a fellow-servant of appellee and that his injuries were caused solely on account of the negligence of Joe H. Myers. (R. 6)

Moreover, treated as a general proposition of assumption of risk, the conclusion will be the same. Conceding that assumption of risk is ordinarily a defense to be pleaded and proved by the defendant, that is not true when the plaintiff's own pleadings or evidence allege or prove facts which show that he assumed the risk. Thus, in *Central Coal & Coke Co.* v. *Burns,* 140 Ark. 147, 215 S. W. 265, it is said:

> "Assumption of risk was an affirmative defense, and the burden of proof was upon the defendant to establish it, *unless it was shown by the plaintiff's own testimony.*"

The same language is used in *Sun Oil Company* v. *Hedge,* 173 Ark. 729, 293 S. W. 9, 13.

It is established, therefore that, unless appellee's complaint was based upon the statute, it utterly failed to state

any cause of action, and his proof failed to establish any liability of appellant. This being established, the cases of *Wiley* v. *Sinkler*, 179 U. S. 58; *Ballard* v. *Hunter*, 204 U. S. 241; *Williams* v. *Walsh*, 222 U. S. 415; and *Hendrick* v. *Maryland*, 235 U. S. 611, cited by appellee on pages 14 and 15 of his brief, are readily distinguishable from the case at bar. The first two cases are affirmative actions by the party attacking the constitutionality of the statutes. Obviously the burden was on the plaintiffs in those cases to show that they were not of the class as to whom the statutes were unconstitutional. In *Hendrick* v. *Maryland, supra*, the appellant was arrested, tried and convicted in Maryland before a justice of the peace for violating the state motor vehicle law in that he operated an automobile over the highway without having procured the certificate of registration required by the law of that state. By that law each owner was required to obtain a certificate and plate, and a non-resident of Maryland who had complied with the laws of the state in which he resided with respect to the registration of motor vehicles was, under specified conditions, permitted to obtain a distinguishing tag and permission to operate his car over the highways for certain periods without paying the ordinary fees for registration and operator's license, but residents of the District of Columbia were not included amongst those to whom the privilege was granted. The appellant contended that the statute was unconstitutional. While it is not quite clear in what respect he challenged the statute, it would seem to be upon the ground that residents of the District of Columbia were discriminated against in that they were not accorded equal privileges with citizens of other states. It was with respect to that contention that the court said:

"The record fails to disclose that Hendrick had

> complied with the laws in force within the District of Columbia in respect of registering motor vehicles and licensing operators, or that he applied to the Maryland commissioner for an identifying tag or marker—prerequisites to a limited use of the highways without cost by residents of other states under the plain terms of section 140a. He cannot therefore set up a claim of discrimination in this particular. Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto."

The fact that defendant was operating upon the highways without a license made a *prima facie* case against him. The burden was therefore upon him to show facts upon which he could challenge the constitutionality of the act. It was, of course, a moot question whether the statute discriminated against residents of the District of Columbia, unless the appellant could show that he had complied with the laws of the District.

In *Williams* v. *Walsh,* the defendant was convicted of selling black powder not in an original package of 12½ pounds, securely sealed, in violation of the statutes of Kansas and was fined $50.00. He filed a petition for a writ of *habeas corpus* in the Supreme Court of Kansas, alleging the illegality of his conviction and the unconstitutionality of the statute as being in conflict with the Fourteenth Amendment to the Federal Constitution and with the Commerce Clause. The Kansas Supreme Court held that the question of whether or not the statute violated the Commerce Clause of the Federal Constitution could not be determined inasmuch as the fact of importation of the package from Missouri did not appear in the trial before the justice. The selling of powder in the State of Kansas otherwise than as pro-

vided by the statute was *prima facie* a violation of the statute. If the sale was in interstate commerce, obviously the burden was upon the accused to show that fact, and, having failed to show it, he was in no position to challenge the validity of the statute as being in violation of the Commerce Clause of the Constitution.

Appellee contends that the record fails to show that the alleged unconstitutional feature of the statute injures appellant. The argument is that the statute could have been made to apply to individuals as well as corporations and, in such case, appellant would still have been liable in this case, and therefore the unconstitutional feature of the statute does not injure appellant. That could be said of every case that has been decided on the equal protection of the law clause of the Fourteenth Amendment. It could have been said of all the decisions of this court cited in appellants' brief, pages 46 to 52. For instance, in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, the appellant would have had to pay an equal amount of taxes had the statute been applicable to individuals as well as to corporations. It is the inequality under the law that renders the statute void.

It was not necessary for appellant to show that there were individuals engaged in the oil and gas business competing with it and that by reason of the burden placed upon it by the statute its cost of producing oil was greater than the cost to individual operators, as suggested by appellee. The statute is not specifically applicable to any particular class of business; it is applicable to corporations, and it is valid or void as to all corporations and not only as to those who can show that in their particular business they

are in competition with individuals. *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 So. 533; *Bedford Quarries Co.* v. *Bough*, 168 Ind. 671. Moreover, this court has judicial knowledge of what everyone knows, namely, that individuals and corporations are engaged in substantially the same businesses, especially in view of section 1700, Crawford & Moses' Digest of the Statutes of Arkansas, authorizing the formation of a corporation "for the purpose of engaging in or carrying on any kind of manufacturing, mechanical, mining, *or other lawful business.*" Whether or not the burden placed upon appellant by this statute was so burdensome as to render its costs of producing oil so high as to make it impossible for appellant to compete with individual operators is not determinative of the question. *It cannot be denied that by the statute in question appellant has been deprived of its property to the extent of $30,000, and, even though it may still be able to compete with individuals in the oil business, it has been injured by the loss of that money.*

It is next suggested by appellee that, inasmuch as prior to the adoption of the statute there was a presumption that a servant received additional compensation to justify the assumption of the risk of the negligence of his fellow-servants, the presumption will be indulged that after the passage of the statute the servant's compensation is fixed at a reduced rate in order to compensate the corporation for assuming the responsibility for the negligent acts of its agents. This is arguing in a circle. If the statute is unconstitutional and void as we contend, then there would, of course, be no presumption that corporations have acted upon the assumption that it is valid and reduced compensation of their employees to compensate the corporations for

the risks imposed by the statute. And, of course, if the statute is valid, no such presumption is necessary.

PART II.

The Merits.

At page 25 of their brief counsel for appellee state that it has been held that statutes abrogating or modifying the fellow-servant rule as to railroad corporations but not as to natural persons operating railroads are valid. The cases cited do not sustain the contention. *Missouri Pac. R. Co.* v. *Mackey,* 127 U. S. 205, and *Chicago, K. & W. Ry. Co.* v. *Pontius,* 157 U. S. 209, dealt with a Kansas statute which applied to every railway *company. Minneapolis & St. L. Ry. Co.* v. *Herrick,* 127 U. S. 210, and *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, dealt with Iowa statutes. The Iowa statute by its terms applied to "every corporation operating a railway," but the Supreme Court of that state construed the statute to include "all corporations *or persons* engaged in operating railroads." *Bucklew* v. *Central Iowa Ry. Co.,* 64 Iowa 603, 21 N. W. 103. This case was cited and quoted with approval by the Kansas Supreme Court in *Missouri Pac. R. Co.* v. *Mackey,* 33 Kan. 298, 6 Pac. 291, 293. *Tullis* v. *Lake Erie & W. Ry. Co.,* 175 U. S. 348, dealt with an Indiana statute which applied to "every railroad or other corporation." But the Supreme Court of Indiana, following *Bucklew* v. *Central Iowa Ry. Co., supra,* construed the statute to include individuals operating railroads. *Pittsburg C. C. & St. Louis Ry. Co.* v. *Lightheiser,* 168 Ind. 438, 78 N. E. 1033; *Pittsburg C. C. & St. Louis Ry. Co.* v. *Montgomery,* 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875.

This answers somewhat the query of Chief Justice WHITFIELD in the case of *Ballard* v. *Mississippi Cotton Oil Company*, 81 Miss. 507, 34 So. 533, with respect to the decision of the Federal Supreme Court in *Tullis* v. *Lake Erie & Western Ry. Co., supra,* where he said, with respect to the contention that, in view of the statute in that case which applied to railroad *corporations* only, the Supreme Court must be assumed to have held that such legislation is valid though applied to corporations owning railroads and not to individuals owning railroads, that it was extremely difficult to make answer for the Supreme Court of the United States. Apparently the learned chief justice had not been advised of the uniform construction of the state courts of the term "railroad corporation."

With respect to the case of *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 584, cited by appellee, it is sufficient to refer to the language of that case that "courts may not declare legislative discrimination invalid, unless *viewed in the light of facts made known or generally assumed,* it is of such character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as a denial of the equal protection of the laws if any state of facts *reasonably* may be conceived to justify it." In order to sustain the statute in question under that language it would be necessary to say that it is *not known* or *generally assumed* that individuals engage in the same businesses as corporations. That, we say, could not "reasonably be conceived." Certainly the Supreme Court, in the numerous cases cited in our original brief, took the view that classifications based

solely upon the character of the employer as to being incorporated or unincorporated were arbitrary.

In *Gulf, Colorado & Sante Fe R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666, the court said:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

The contention of appellee that facts should be assumed upon which the legislature might justly make a distinction between individual and corporate employers is refuted by a decision of this court on December 16, 1935, in *Coalgate* v. *Harvey,* 80 L. ed., Advance Opinions, page 225, where it was held that a state income tax law excluding from taxable income interest received on money loaned within the state at a rate of interest not exceeding five per cent per annum violates the equal protection clause of the Fourteenth Amendment as making a classification based upon a difference having no apparent substantial or fair relation to the object of the act or the public interest. Mr. Justice SUTHERLAND, in delivering the opinion of the court, said:

> "Upon the face of the statute the classification is based upon a difference having no substantial or fair relation to the object of the act—which, so far as this question is concerned, simply is to secure revenue. *The statute itself suggests no other public purpose which will be served by the exemption.* The language creating the exemption is, '*(a)* Interest received on account of

money loaned within this state, at a rate of interest not exceeding five per cent per annum * * *.' The naked and complete test afforded by the statute is that the money shall be loaned within the state. What is to be done with the money, whether it is to be invested in the state or elsewhere—indeed whether it is to be devoted to any useful purpose—are matters having nothing to do with the imposition of the tax or the exemption therefrom. If the statute had provided that interest on account of money so loaned when invested in property having a situs within the state shall be free from the tax, a different question as to classification might be presented. In that event the actual wealth of the state would be increased, and in addition, and as a consequence, opportunity to obtain additional revenue through taxation would result. But this exempting provision, we repeat, contains neither this qualification nor any other. Its terms are positive and all-inclusive and will be fully satisfied whenever it appears that money has been loaned within the state. *The Supreme Court of Vermont has not read into the statute a qualification that loans shall be deemed to be made within the state only if their proceeds be invested in the state. Obviously this court cannot so read the provision, for that would be to amend and not to construe it.* We are unable to find in the provision any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan.

"It is suggested, however, that, aside from anything in the statute, money loaned within the state generally will be invested therein. But there is nothing in the record to indicate that this will result; and for aught this court can know judicially, there is no warrant for saying either that it will or will not result. All we can say is that money so loaned MAY BE invested in Vermont, or MAY BE invested in some other state —for example, in property having a situs in New York

—or may not be invested at all. If there be circumstances which will justify the exemption of any income derived from money loaned within the state while taxing the income from that loaned outside, it is for the state legislature to point them out and limit the exemption accordingly. To import any such circumstances into the present situation is to indulge in pure speculation. Compare *Travis* v. *Yale & T. Mfg. Co.*, 252 U. S. 60, 81, 64 L. ed. 460, 470, 40 S. Ct. 228.

"To assume that some unnamed public interest exists, which will sustain the discrimination, does not help the matter here; because the assumption can rest only upon surmise, with nothing concrete or explicit appearing to support it or to indicate a legislative intent to relate the exemption to any public purpose or to anything else beyond the mere fact that the favored loans are effected within the state. In principle, the classification is quite as arbitrary as that dealt with by this court in *Louisville Gas & E. Co.* v. *Coleman, supra* (277 U. S. 38, 39, 72 L. ed. 774, 775, 48 S. Ct. 423). If the exemption had been made to depend upon the TIME when the loan was made, instead of upon the LOCALITY where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted, although a minute inspection of the field of possibilities might persuade an anxious mind, bent on sustaining the tax at all events, to the view that in some far-fetched way a loan made on Monday would further some public purpose, other than that of revenue, which a loan made on another day of the week would not."

We respectfully submit that it would have been much more reasonable for this court to assume that money loaned within the State of Vermont would be invested in that state than to assume that all corporations in the State of Arkansas are engaged in a hazardous business and that

individuals and partnerships are engaged in a non-hazardous business, or that there is any other difference in the businesses conducted by corporations from those of individuals which would justify abrogating the fellow-servant ~~rule~~ as to corporations and not as to individuals and partnerships. Not only would such an assumption rest upon surmise, but it would be an assumption of facts which there is every reason for believing are not true, especially in view of the Arkansas statute authorizing corporations to be formed for the purpose of carrying on any lawful business. Section 1700, Crawford & Moses' Digest of the Statutes of Arkansas.

Counsel for appellee have written a treatise on the origin and development of the fellow-servant rule, particularly with reference to non-delegable duties, superior servants, separate departments, and vice-principals, as established by the decisions of the Supreme Court of Arkansas. It is contended that, under the decisions as established by that court, there were certain inequalities in the application of the fellow-servant doctrine to individual and corporate employers, by reason of which there was just ground for the legislature to abolish the rule as to corporations and leave it in force as to individuals. The decisions cited, however, do not appear to make any distinction between individual and corporate employers. The rules laid down are with respect to the law of master and servant without distinguishing between individual and corporate masters. It is contended that, under the decisions of the Supreme Court of Arkansas, a corporation, prior to the adoption of the statute, was liable for injuries to an employee only when the injury was the result of the breach of some personal,

positive and non-delegable duty, whereas, an individual employer was liable for any order or act of his own, whether with respect to some non-delegable duty or a detail of the work. We find nothing in this argument which is not fully and completely answered by the first case ever to be decided in the American courts on the fellow-servant doctrine. *Murray* v. *S. C. R. Co.*, 1 McMullan's Law 385, 36 American Decisions 268. It was there said:

> *"There is nothing in the fact, that the defendant is a corporation, except that of necessity it must act altogether by agents. The liability is precisely the same as if the defendant was an individual acting by the agency of others.* * * *
>
> *"It was said in the argument that if the engineer had been the owner of the road he would have been liable. Of this I apprehend there would have been no doubt, but then his liability would have arisen, not from his being the owner, but because the injury arose from his own act. That he is now liable seems to me to admit of no doubt. But it by no means follows as a consequence that because he is liable those who employ him are liable also."*

Counsel for appellee have not pointed out where there was any inequality in the application of the common law fellow-servant doctrine to individual and corporate employers carrying on business by means of agents. The most that can be said is that a corporation, by reason of the fact that it is a corporation, cannot go out and work with the employees and must necessarily act through agents and employees, whereas an individual employer may at times go out and work with his employees, and, if he is negligent, he will be individually liable. But, as pointed out in the quotation from *Murray* v. *S. C. R. Co., supra,* his liability

is based upon the fact that he did the negligent act rather than the fact that he was the employer of the injured person. Likewise, corporation employees, whether of high or low rank, who do a negligent act causing injury to other employees are personally liable, and thus the employee has no less right when injured through the negligence of another when the negligent person is a manager, officer, or employee of a corporation than when he is an individual employer. Even under appellee's own contention a corporation was liable prior to the adoption of the statute for any injury caused by any employee who was performing a non-delegable duty. Thus, the law was that a corporation would be held liable equally with an individual in such cases as the employer, if an individual, would ordinarily act in person. This is what we understand to be the non-delegable duties of a master. It is clear, therefore, that the law of Arkansas prior to the adoption of the statute was that an individual and a corporate employer were upon equal footing so far as their liability to employees for injuries through the acts of other employees was concerned. True, individuals could make themeslves liable for acts where a corporation could not by going out and working with the employee and personally committing a negligent act. But the fellow-servant law applies only to employers conducting a business by means of employees. So long as the individual conducted his business by means of employees his liability for injuries was precisely that of corporate employers. There was therefore no inequality in the law justifying any modification as to corporations.

Moreover, if there had been any inequity in the law in the respect contended by counsel for appellee, legislation would have been justified only to the extent of placing the

individual and corporate employers upon an equal footing, which the statute in question does not purport to do. Counsel for appellee contend that once an inequality exists the right to classify exists and the details of the legislation and the exceptions to be made are in the sound discretion of the legislature. We concede that legislation with respect to classification need not be mathematically perfect, but we deny that *any* inequality would justify legislation such as that in question which does not correct the inequality but creates a greater burden upon corporations. The correct rule is that the classification must be based upon a real and substantial difference having a reasonable relation to the subject of the particular legislation. If there were any differences with respect to the liability of individual and corporate employers for the acts of superior servants, vice-principals, etc., legislation correcting those differences would probably not be objectionable, but such differences would not authorize the legislature to abrogate the fellow-servant rule entirely as to corporations, for such legislation would not have a reasonable relation to the objects to be accomplished, but would be purely arbitrary. Moreover, *the inequalities claimed by counsel for appellee have no relation whatever to the facts of this case.* In this case there is no question of superior servants, vice-principals, separate departments, or non-delegable duties. The complaint and the evidence show without any question that the negligence upon which recovery was sought and allowed was that of an ordinary employee engaged in common labor in the same department as appellee, having no superior rank, both being engaged at the time of the accident in the act of carrying a joint of pipe. Counsel have not attempted to point out

that there ever was any inequality in the liability of individual and corporate employers under similar circumstances.

On page 48 of their brief counsel for appellee say that corporations as a class were relieved from all liability except for the breach of a non-delegable duty and that such was not the rule with respect to individual masters. They then quote from 3 Labatt's Master & Servant, Second Edition, page 2396, which deals with the master's liability for his *personal misconduct*. The sentence immediately following that portion of the text quoted reads as follows: "*So also a corporation is liable for the personal negligence of a director.*" The text cites, among other authorities, *Harrison* v. *Detroit, etc., R. Co.*, 79 Mich. 409, 19 A. S. R. 180, 7 L. R. A. 623, 44 N. W. 1034. In the syllabus of that case, as reported in A. S. R., appears the following:

> "Where parties are fellow-servants *while engaged in the business of a natural person, they should be so considered when engaged in the business of a corporation; and if one is the agent or superior servant while engaged in the business of a corporation, and through his negligence another engaged in the same business is injured, and for whose injury the corporation is liable, then, under like circumstances, if it was the business of a natural person, the master should be held liable.*"

This case shows clearly that there is no difference between the liability of an individual and a corporate employer for the negligence of fellow-servants.

The case of *Silver* v. *Silver*, 280 U. S. 117, cited by appellee, is not in point. That case is in line with many others holding that the difference between the business of railroading and other businesses is sufficient to place railroad companies in a separate classification. There is undoubtedly a difference between automobiles and other vehicles which

would justify legislation with respect to gratuitous passengers in automobiles without including gratuitous passengers in other conveyances. Just as the legislature may classify railroading, coal mining, and other hazardous businesses separately with respect to liability of the employer to the employees for personal injuries without including other businesses just as hazardous, but different, so may the legislature classify automobiles without including other vehicles. But our point is that there is *no* difference between a business carried on by an individual and a corporation, and therefore it is not permissible to classify corporations for purposes of liability to their employees. That is basing the liability upon the *character* of the *employer* rather than upon the business transacted. The businesses may be, and in many instances are, identical.

The case of *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, cited by appellee, is not in point. There a statute of Missouri requiring corporate employers to give former employees a service letter was held valid. The statute did not deprive the corporation of anything of value. As stated by this court, it was "but a *regulation* of corporations calling for an application of the familiar precept '*sic utere tuo*', etc., in a matter of general concern." This court said further:

> "No well-considered judgment, much less a formidable body of opinion, worthy to be regarded as supporting the view that a statute which, like the Missouri statute, merely requires employing corporations to furnish a dismissed employee with a certificate setting forth the nature and character of the service rendered, its duration, and for what cause, if any, the employee has left such service, amounts to an interference with freedom of contract *so serious and arbitrary* as properly to be regarded a deprivation of liberty or property with-

out due process of law, within the meaning of the 14th Amendment."

And again:

> "What more reasonable than for the legislature of Missouri to deem that the public interest required it to treat corporations as having, in a peculiar degree, the reputation and well-being of their former employees in their keeping, and to convert what otherwise might be but a legal privilege, or, under prevailing customs, a 'moral duty,' into a legal duty, by requiring, as this statute does, that when an employee has been discharged or has voluntarily left the service, it shall give him, on his request, a letter setting forth the nature and character of his service and its duration, and truly stating what cause, if any, led him to quit such service."

And further:

> "The argument under the 'equal protection' clause is unsubstantial. As we are assured by the opinion of the Supreme Court, the mischiefs to which the statute is directed are peculiarly an outgrowth of existing practices of corporations, and are susceptible of a corrective in their case not so readily applied in the case of individual employers, presumably less systematic in their methods of employment and dismissal."

And again:

> "As has been shown, the Missouri statute interposes no obstacle or interference as to either the making or the termination of contracts of employment, and prescribes neither terms nor conditions. *The Supreme Court of the state, having ample knowledge of the conditions which gave rise to the particular legislation, declares with an authority not to be denied that it was required in order to protect the laboring man from conditions that had arisen out of customs respecting employment and discharge of employees introduced by the corporations themselves.*"

The Arkansas statutes and decisions will be searched in vain for any expression of a condition, custom, or circumstance whereby the legislation in question was peculiarly applicable to corporations. If there was any such condition, it should have been pointed out by the legislature and, if not by the legislature, by the state Supreme Court. *Colgate* v. *Harvey, supra.*

At page 58 of appellee's brief it is suggested that the legislature may have believed that an employee of an individual would report to his employer that a fellow-servant, even his immediate superior, was negligent or incompetent, and that therefore the competent servant exception was a sufficient safeguard; but that it may have found that, in the case of a corporation acting only through agents with the management often far removed from the scene of operations, the employee would be less likely to report the negligence of a fellow-servant, thereby presenting a situation so different that the common law rule did not afford ample protection. The reason given for this suggested difference is that in the case of an individual employer the report of the servant would be more apt to be kept secret than in the case of a report to the servant's superior acting for a corporation, on account of the fact that the servant's superior would ordinarily have no right to hire and fire and his knowledge of a servant's incompetence would not constitute notice to a corporation, so that in order to charge the company with notice the servant would have to report in writing to some officer having the power to hire and fire, thereby making it less likely that the report would be kept secret and the servant protected. Even if these facts existed they would not justify the legislation in question. We

do not understand that it is necessary that a master have actual knowledge of the incompetency of a servant, and we think that notice to the person in charge would certainly bind the corporation. We take it that the rule with respect to negligence of a master in a matter of this kind is the same as negligence of any other kind, and a corporate employer would be held liable for furnishing an incompetent servant where it knew or could have known by the exercise of ordinary care that the servant was incompetent. Counsel have cited no authority holding that actual notice must be given to the employer of the incompetency of a fellow-servant in order to make him liable.

Moreover, the suggestion of what the legislature may have found comes squarely within the "possibilities" condemned by this court in *Colgate* v. *Harvey, supra,* where it said:

> "If the exemption had been made to depend upon the TIME when the loan was made, instead of upon the LOCALITY where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted, although a minute inspection of the field of possibilities might persuade an anxious mind, bent on sustaining the tax at all events, to the view that in some far-fetched way a loan made on Monday would further some public purpose, other than that of revenue, which a loan made on another day of the week would not."

Moreover, it cannot be reasonably assumed that a servant would be in direct contact with an individual employer and that he would not have any personal contact with the managing officers of a corporation. This might be true where the individual employer was operating a small busi-

ness and where the corporation was operating a large one, but the legislation in question makes no such distinction. It applies equally to large individual employers and small corporate employers. It cannot be reasonably assumed that all individual employers employ only a few men and are in personal contact with their employees and that all corporations carry on extensive operations and the managing officers are not in personal contact with employees. The legislature perhaps could have validly abrogated the fellow-servant doctrine as to all employers of a certain number of men, whether the employer was an individual or a corporation, and that would be the proper way to reach the situation complained of by counsel for appellee. They seek to have this court sever the act and hold it valid as to large corporations even though it may be invalid as to small ones.

Nor can it be assumed, as counsel for appellee suggest, that the legislature may have found that corporations in Arkansas were engaged in hazardous businesses and that individual employers were engaged in businesses relatively safe to employees. Section 1700, Crawford & Moses' Digest of the Statutes of Arkansas, authorizes the formation of corporations to engage in any lawful business. Section 1825 authorizes foreign corporations to do business in the state. It would be fantastic to assume that corporations in Arkansas are engaged only in the more hazardous businesses while the individuals are engaged only in those which are relatively safe. That the legislature had no such thought is clearly shown by the statute itself. The statute specifically includes railroad companies and coal mining companies, whether incorporated or not, thus showing that the legis-

lature deemed those businesses particularly hazardous, requiring separate classification, and that they would not be reached by the general classification of corporations. If counsel's theory is correct, the statute would have made no mention of railroad or coal mining companies, but would have applied to corporations only. Certainly the legislature, or the Supreme Court in its decisions, points out no such condition peculiar to that state.

We have never contended that the act in question was void as to foreign corporations only. We have contended that it is void as to all corporations, both foreign and domestic. We have merely pointed out that the reasoning of the Arkansas Supreme Court in upholding the act on the theory of the reserve power in the state to amend corporate charters is not applicable to foreign corporations. We have pointed out in our original brief that a state has no greater power under the reserved right to amend corporate charters than it has under the police powers of the state. We contend that the act is invalid as to all coporations, both domestic and foreign.

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION,

Appellants,

vs.

R. O. JENKINS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION.

L. B. SMEAD,
J. V. SPENCER,
ROBERT C. KNOX,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, ET AL.,
Appellants,

vs.

R. O. JENKINS,
Appellee.

MOTION TO DISMISS OR AFFIRM.

Comes R. O. Jenkins, appellee, by L. B. Smead, J. V. Spencer and Robert C. Knox, his counsel, and moves this Court to dismiss the appeal in this cause for want of jurisdiction; and because the record fails to show that appellant is within the class with respect to whom it is alleged the statute under examination is unconstitutional; and because the record does not properly present a substantial Federal question; and because the appeal is informal, irregular and insufficient for reasons stated in the annexed argument and statement denying jurisdiction and upon other grounds: and appellee also moves this Court to affirm the judgment of the Arkansas Supreme Court herein upon the grounds that it is manifest that the appeal herein was taken for

delay only, and that the question upon which it is claimed that the jurisdiction depends are so frivolous as not to need further argument.

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Counsel for Appellee.

Service acknowledged this 6th day of July, 1935.

NEILL C. MARSH,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, ET AL.,
Appellants,

vs.

R. O. JENKINS,
Appellee.

STATEMENT MAKING AGAINST JURISDICTION AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

A.

Record Fails to Show Appellant of Class Entitled to Raise Question.

The question of whether or not the statute under examination violates the provisions of the Fourteenth Amendment to the Constitution of the United States has once before been before this Court. (1)

There, this Court held that a corporation operating a railroad could not challenge the validity of the act, it not being in the class which could raise the question as to dis-

crimination between individuals and corporations generally.

The selection by the Act, of companies operating coal mines as a class upon which to impose responsibility for negligence of certain employees causing injury to other employees, does not, as to such companies, render the Act repugnant to the Constitution as denying equal protection of the laws. (2)

There is no competent evidence in the record as to whether appellant does or does not operate a railroad or a coal mine. The constitutionality of this statute was not brought in question during the trial of this cause, but was raised for the first time in the Motion for New Trial, filed more than sixty days after the verdict and judgment. Appellant offered no proof at the trial to establish the fact that it did not operate a railroad or a coal mine. It is true that the following statement appears as a part of paragraph Ninth of Appellant's Motion for New Trial: "• • • it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine." This unverified, *ex-parte*, statement of appellant's counsel set out in the Motion for New Trial that appellant "was not engaged in operating any railroad or any coal mine" is no proof of that fact, and under the settled practice in Arkansas, the insertion of such statement in the Motion for New Trial did not make it a part of the record, nor present it for the consideration of the Court. (3)

"It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the Act is unconstitutional, and that the alleged unconstitutional feature injures him. (4)

Since there is no proof in the record that appellant *does not* operate a railroad or a coal mine, it has failed to show that it is within the class of corporations entitled to raise the question of discrimination, and its appeal for that reason should be dismissed.

The fact that appellee at the time of his injury was not employed in the operation of a railroad or the mining of coal, is not material, since the test is whether or not appellant operates a railroad or a coal mine, the statute making such companies liable to employees of all classes and in all departments without respect to hazard, and this fact does not render the act invalid. (5)

B.

Record Does Not Properly Present a Substantial Federal Question.

The record does not properly present a substantial Federal question. As before stated, the constitutional question was not raised during the trial of this cause. The record therefore is silent as to local conditions in Arkansas bearing on the question of whether there may be differences between the business generally carried on by corporations, and individuals, which would justify the application of different rules of law. It is not shown whether in 1907, when the challenged statute was enacted, or since, differences in the legislative schemes of the state affecting the two classes, or differences in business practices of corporations and individuals within the state do not furnish reason for different rules. The Court is asked to say *a priori* that there can be no reasonable basis for the legislative judgment.

The burden of establishing the unconstitutionality of the statute rested on appellant, and it will not be held invalid unless facts made known or generally assumed are such

as to preclude the assumption that the classification rests upon some rational basis. (6)

A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (7)

There is no showing that the situation of corporations employing servants in Arkansas is so similar to that of individuals and partnerships employing servants, as to preclude any rational distinction between them, with respect to liability for the negligent act of one servant causing injury to another.

The legislature may have believed that an individual master who would of necessity come in personal contact with his men and their families would feel sufficient moral responsibility for their safety to insure that he would employ only careful and prudent men to work with them, while in the case of a corporation, acting only through agents, with the management often far removed from the scene of operations, no such personal and moral responsibility would exist, and the safety of men could be better insured by making the corporataion responsible for the negligent acts of the men whom it employed.

Likewise, the legislature may have found that generally in Arkansas, corporations were engaged in that type of business which carried with it increased hazard to their employees, such as manufacturing, mining, operating railroads, street cars, electrical systems, gas lines, etc., while as a general rule the individual employer was engaged in business where his employee was relatively safe, such as agriculture, the trades, etc.

If the legislature found such differences, it could in its judgment make a choice of method to guard against the evil. (8)

It could likewise decide whether the differences are general enough as respect corporations, to call upon it to say whether the provisions of the act should be applied to them

as a class rather than to members of it selected by more empirical methods. (9)

C.

Question One of Local Law.

The Arkansas Supreme Court holds this statute valid as an Amendment to the charters of corporations made under the right reserved in the Constitution of the State to repeal, alter, or amend such charters. (10) The decision is therefore one of local law. The fact that appellant is a foreign corporation does not change the rule since the Constitution of Arkansas specifically provides that foreign corporations admitted to the State "shall be subject to the same regulations, limitations and liabilities as like corporations of this State." (11) And it has been repeatedly held that that which a State may do with corporations of its own creation, it may do with foreign corporations admitted therein. (12)

To sustain his allegations making against jurisdiction, and in support of his Motion to Dismiss or Affirm, appellee respectfully calls attention to the following cases:

A. Record Fails to Show Appellant of Class Entitled to Raise Question.

(1) *Aluminum Co.* v. *Ramsey,* 251 U. S. 256.

(2) *Wilmington Star Min. Co.* v. *Fulton,* 205 U. S. 260.

(3) *Cox* v. *Cooley,* 88 Ark. 350; *Foohs* v. *Bilby,* 95 Ark. 302; *Cravens* v. *State,* 95 Ark. 321; *Wolfe* v. *State,* 107 Ark. 29.

(4) Mr. Justice Brandeis in *Heald* v. *District of Columbia,* 259 U. S. 114, citing: *Albany County* v. *Stanley,* 105 U. S. 305, 311; *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 160; *Citizens Nat. Bank* v. *Kentucky,* 217 U. S. 443, 453; *Plymouth Coal Co.* v. *Pennsyl-*

vania, 232 U. S. 531, 544; *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526, 530; *Arkadelphia Co.* v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, 149.

(5) *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Manduo* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1; *Mo. Pac. R. Co.* v. *Mackey*, 123 U. S. 205; *Mobile J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35.

B. Record Does Not Properly Present a Substantial Federal Question.

(6) *Metropolitan Casualty Inc. Co.* v. *Brownell*, decided March 18, 1935, 79 L. E. 564; *Erb* v. *Morasch*, 177 U. S. 584, 586; *Stebbins* v. *Riley*, 268 U. S. 137, 143; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 158; *Swiss Oil Corp.* v. *Shanks*, 273 U. S. 407, 413, 414; *Ft. Smith Light & Traction Co.* v. *Board of Improvement*, 274 U. S. 387, 391, 392; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392; *Silver* v. *Silver*, 280 U. S. 117, 123; *O'Gorman & Young* v. *Hartford F. Ins. Co.*, 282 U. S. 251, 257, 258.

(7) *Metropolitan Casualty Ins. Co.* v. *Brownell, supra*; *Rast* v. *Van Deman & L. Co.*, 240 U. S. 342, 357; *State Tax Comrs.* v. *Jackson*, 283 U. S. 527, 537.

(8) *Metropolitan Casualty Ins. Co.* v. *Brownell, supra*; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *Hardware Dealers Mut. F. Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158.

(9) *Metropolitan Casualty Ins. Co.* v. *Brownell, supra*; *Ohio ex rel. Clarke* v. *Deckebach, supra* (274 U. S. 397); *Westfall* v. *United States*, 274 U. S. 256, 259; *Silver* v. *Silver*, 280 U. S. 117, 123.

C. Question One of Local Law.

(10) Art. 12, Sec. 6, Constitution of Arkansas, *Ozan Lumber Co.* v. *Biddle*, 87 Ark. 587.

(11) Art. 12, Sec. 11, Constitution of Arkansas.

(12) *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530; *Dayton Coal & Iron Co.* v. *Barton*, 183 U. S. 23.

It is therefore respectfully submitted that this Court is without jurisdiction of this cause, and that this appeal should be dismissed; or that appellee's alternative Motion to Affirm should be granted.

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(6822-C)

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Supreme Court of the United States

OCTOBER TERM, 1935

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION ..... *Appellants,*

v. No. 386

R. O. JENKINS ..... *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLEE

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Another statute, not here in question, (C. & M. Digest, 7144) also abrogates fellow-servant rule as to corporations, and would apply here.

2. RECORD FAILS TO SHOW APPELLANT OF CLASS ENTITLED TO RAISE QUESTION 10

This statute has been held valid as applying to corporations operating railroads, and similar statutes applying to companies operating mines have been held valid. The burden was on appellant to show that it did not operate a railroad or coal mine, in order to show that it was within the class entitled to raise question, and this it has failed to do.

3. RECORD FAILS TO SHOW THAT THE ALLEGED UNCONSTITUTIONAL FEATURE OF STATUTE INJURES APPELLANT 21

The record fails to show that appellant must or does conduct its business in competition with natural persons in like business, or any other fact disclosing that it is injured by reason of the fact that natural persons are not included within the provisions of the act. Furthermore there is a presumption that, as an implied condition of the contract of employment between appellant and appellee, the risk of negligence of fellow-servants was assumed by appellant and not appellee.

4. THE SELECTION OF CORPORATIONS AS A CLASS FOR APPLICATION OF THE ACT IS NOT ACTUALLY AND PALPABLY UNREASONABLE AND ARBITRARY, BUT RESTS UPON FAIR AND SUBSTANTIAL DIFFERENCE 24

Corporations as a class have always presented a problem in the application of the fellow-servant doctrine. The rule as first announced relieved corporations of all liability for injury to their servants. Because of corporations certain exceptions to the rule were required, and in applying these exceptions many of the courts have dealt with corporations as a separate class. The separate classification of corporations in respect to the fellow-servant doctrine has been well and long recognized by the courts.

5. ASSUMING THAT APPELLANT MAY NOW RAISE QUESTION THAT ACT IS INVALID AS TO FOREIGN CORPORATIONS SPECIALLY, IN SPITE OF FACT THAT IT ASSIGNS ERROR SOLELY ON GROUND THAT ACT IS INVALID BECAUSE IT DENIES EQUAL PROTECTION TO ALL CORPORATIONS, SUCH GROUND IS UNAVAILING FOR IN ALL EVENTS ACT IS VALID AS TO DOMESTIC CORPORATIONS UNDER STATE'S RESERVED POWER TO AMEND CHARTERS AND FOREIGN CORPORATIONS CAN CLAIM NO GREATER RIGHT THAN IS ACCORDED DOMESTIC CORPORATIONS 61

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Supreme Court of the United States

OCTOBER TERM, 1935

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION ..... *Appellants,*

v. No. 386

R. O. JENKINS ..... *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR APPELLEE

THE DECISION BELOW

This is an appeal from the judgment of the Supreme Court of Arkansas rendered in the case of *Phillips Petroleum Company* v. *Jenkins*, 190 Ark. 964, denying appellant's contention that Section 7137 of Crawford & Moses' Digest of the Statutes of Arkansas, which abolished the fellow-servant rule as a defense, in so far as it applied to "all railroad companies, whether incorporated or not, and all corporations of every kind or character, and every company, whether incorporated or not, engaged in the mining of coal," denies appellant equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF CASE

The statement appearing at pages 32 to 35 of appellant's brief is a full statement of all that the record discloses. The constitutionality of this statute was not brought in question during the trial of this case, but was raised for the first time in appellant's Motion for New Trial, filed more than sixty days after the verdict and judgment. The record is, therefore, silent upon many matters which we think necessary to the determination of this question. The record fails to show whether appellant does or does not operate a railroad or a coal mine. The record does not show that appellant in the conduct of its business in Arkansas is in competition with natural persons doing a like business. The record is silent as to legislation or other local conditions in Arkansas bearing on the question. The Court is asked to say *a priori* that there could have been no distinction justifying a difference in the application of the fellow-servant doctrine as between corporations on the one hand and natural persons on the other at the time of the adoption of this statute.

ARGUMENT

1.

A DECISION ON THE VALIDITY OF SECTION 7137 OF CRAWFORD AND MOSES' DIGEST IS NOT NECESSARY TO THE DETERMINATION OF THIS CAUSE

There are two separate and distinct statutes, in force in Arkansas, abolishing (as to corporations) the defense of ~~Assembly of Arkansas in 1907 and is now Section 7137 of~~ Common Service, either of which would be applicable here.

The first of these statutes was adopted by the General Assembly of Arkansas in 1907 and is now Section 7137 of Crawford & Moses' Digest, and is the statute which appellant here alleges violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. This statute reads as follows:

> "Hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from careless omission of duty or negligence or such employer, or which may result from the carelessness, omission of duty or negligence of any other agent, servant or employee of said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

(Act March 8, 1907, p. 163.)

The other of these statutes is a part of the Employers' Liability Act adopted by the General Assembly in 1913, and is now Section 7144 of Crawford & Moses' Digest and reads as follows:

> "Every corporation, except while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he is employed by such corporation, or, in case of death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin of such employee, for such injury or death resulting in whole or in part from negligence of such corporation or from the negligence of any of the officers, agents or employees of such corporation."

(Acts 1913, p. 734, par. 1.)

Section 7144 was applied by the Supreme Court of Arkansas in the very recent case of *Postal Telegraph Company* v. *White*, 190 Ark. 365, 80 S. W. (2d) 633. An appeal to this Court was granted and the cause assigned number 145 on the docket for the October, 1935, term. The appeal was dismissed on October 14, 1935, "for the want of a properly presented Federal Question."

Reference to Section 7144 can be found at no place in the record, nor in the brief of appellant. The first time a constitutional question of any character was presented was in appellant's motion for new trial. There, the only fellow-servant statute brought in question was Section 7137 (R. 13-14). It was also alleged in the motion that Section 7145, Crawford & Moses' Digest, violated the Fourteenth

Amendment. This section is the Comparative Negligence statute, which also applies only to corporations. This question was abandoned evidently because the verdict of the jury awarded equal damages against both the corporate master and the individual servant, disclosing that the jury found appellee free of contributory negligence.

In its assignment of errors presented here appellant questions only Section 7137 (R. 98).

If Section 7137 had been repealed prior to the date of appellee's injury, Section 7144 would have applied with equal force, and the judgment here would not be different. If it were determined then that Section 7137 is unconstitutional the judgment of the State court would still be correct.

We understand the rule to be that ordinarily a decision relating to the constitutionality of a statute will be pronounced only if and when such is necessary to a determination of the controversy.

Siler v. *L. A. N. R. Co.*, 213 U. S. 175.

Light v. *United States*, 220 U. S. 523.

San Bernandino Co. v. *Sou. P. R. Co.*, 118 U. S. 417.

Liverpool, etc., Co. v. *Commissioners*, 113 U. S. 33.

Aluminum Co. v. *Ramsey*, 222 U. S. 251.

It may be argued that the two statutes are so similar that if one is unconstitutional the other is likewise.

The answer to that is that the Court will not at this time undertake to determine the validity of Section 7144, for it is the settled rule of this Court "never to anticipate

a question of constitutional law in advance of the necessity of deciding it." *Liverpool, etc., Co.* v. *Commissioners, supra.*

It is also well settled that this Court will not pass on the constitutionality of a statute until that question has first been presented to and determined by a lower court.

Southwestern Oil Co. v. *Texas,* 217 U. S. 114.

Chesapeake, etc., Ry. Co. v. *McDonald,* 214 U. S. 191.

Cox v. *Texas,* 202 U. S. 446.

2.

RECORD FAILS TO SHOW APPELLANT OF CLASS ENTITLED TO RAISE QUESTION

The question whether or not the statute under examination violates the provisions of the Fourteenth Amendment to the Constitution of the United States has once before been before this Court.

Aluminum Co. v. *Ramsey,* 222 U. S. 251.

In that case the company (as is shown by the statement of facts at 89 Ark. 522) "operated a narrow gauge railroad with a trackage of two miles which it used for the purpose of hauling the ore from the mines to the drying shed." This Court held that a corporation operating such a railroad could not challenge the validity of the act, it not being in the class which could raise the question as to discrimination between natural persons and corporations generally.

The selection by the Act, of companies operating coal mines as a class upon which to impose responsibility for

negligence of certain employees causing injury to other employees, does not, as to such companies, render the Act repugnant to the Constitution as denying equal protection of the laws.

Wilmington Star Min. Co. v. *Fulton*, 205 U. S. 60.

At page 42 of its brief, appellant concedes that the statute is valid as to corporations operating railroads or coal mines.

The record is entirely silent as to whether appellant does or does not operate a railroad or a coal mine or both.

The constitutionality of this statute was not brought in question during the trial of this cause, but was raised for the first time in the Motion for New Trial, filed more than sixty days after the verdict and judgment. Appellant offered no proof at the trial to establish the fact that it did not operate a railroad or a coal mine. It is true that the following statement appears as a part of paragraph Ninth of appellant's Motion for New trial: "* * * *it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine.*" This unverified, *ex-parte*, statement of appellant's counsel set out in the Motion for New Trial that appellant "was not engaged in operating any railroad or any coal mine" is no proof of that fact, and under the settled practice in Arkansas, the insertion of such statement in the Motion for New Trial did not make it a part of the record, nor present it for the consideration of the Court.

Cox v. *Cooley*, 88 Ark. 350.

Foohs v. *Bilby*, 95 Ark. 302.

Cravens v. *State*, 95 Ark. 321.

Wolfe v. *State*, 107 Ark. 29.

It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the Act is unconstitutional, and that the alleged unconstitutional feature injures him.

Heald v. *District of Columbia*, 259 U. S. 114.

Albany County v. *Stanley*, 105 U. S. 305, 311.

New York ex rel. Hatch v. *Reardon*, 204 U. S. 152, 160.

Citizens' Nat. Bank v. *Kentucky*, 217 U. S. 443, 453.

Plymouth Coal Co. v. *Pennsylvania*, 232 U. S. 531, 544.

Thomas Cusack Co. v. *Chicago*, 242 U. S. 526, 530.

Arkadelphia Co. v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, 149.

Mallinckrodt Chem. Works v. *Missouri*, 238 U. S. 41, 54.

Tyler v. *Judges of Ct.*, 179 U. S. 405.

Southern Ry. Co. v. *King*, 217 U. S. 524, 534.

Hooker v. *Burr*, 194 U. S. 415, 419.

Standard Stock Food Co. v. *Wright*, 225 U. S. 540, 550.

Rosenthal v. *New York*, 226 U. S. 260, 271.

Turpin v. *Lemon*, 187 U. S. 51, 60.

Clark v. *Kansas City*, 176 U. S. 114, 118.

Counsel for appellant at pages 22 and 23 of their brief say as to the above cases:

> "There was no question * * * as to the burden of proof. The facts were disclosed by the record and upon the facts as they appeared from the record the complaining party was not injured by the alleged unconstitutional feature of the statute. * * *
>
> "The cases cited by appellee would be applicable here only if the record affirmatively showed that appellant was a railroad company or a company engaged in mining coal."

The above argument is directly in conflict with the plain words of the opinions cited. It is true that the cases do not directly use the words "burden of proof" but the words used are synonymous.

For instance, in the last paragraph on page 23 of their brief counsel use the words "burden" and "incumbent" as synonymous terms. They say:

> "The question here presented is where lies the burden of proof. *Was the burden upon appellee to allege and prove* that appellant was a railroad company or engaged in the mining of coal, or was it *incumbent upon appellant to allege and prove* that it was not engaged in either of those businesses?"

In the case of *Louisville & N. R. Co.* v. *Finn*, 235 U. S. 601, Mr. Justice Pitney, in reaffirming and applying the rule, uses the word "incumbent," saying:

> "* * * as has often been pointed out, it is *incumbent* upon one who seeks adjudication that a State statute is repugnant to the Federal Constitution *to show* that he is within the class with respect to whom it is

unconstitutional, and that the alleged unconstitutional feature injures him, and so operates to deprive him of rights protected by the Constitution."

While it is, of course, true that general expressions found in opinions are to be construed in light of the facts of the decided case, this does not mean that when the facts of a case require the pronouncement and application of a rule of practice, that courts should couch the rule within the limits of those facts. To do so would be stating only "half truth" which would be misleading and erroneous. In the cases *supra*, the records disclosed that the appellants were not within the class. The court was therefore required to announce a rule of practice governing this state of facts. A declaration only that "where the record discloses that appellant is not within the class he cannot be heard" would have been but a part of the true rule, and would have been a mis-statement of the rule. The question being presented, it was necessary for the court to determine the true rule, and then apply it to the facts. The true rule is not that "where the record discloses that appellant is not within the class" but rather "where the record does not disclose that appellant is within the class, the burden being on him in this regard."

There are cases which, we think, directly apply the rule, and in which relief was denied not because the record affirmatively disclosed that the one seeking relief was not within the class entitled to raise the question but because the record failed to show that he was within such class.

Wiley v. *Sinkler*, 179 U. S. 58, 67.

Ballard v. *Hunter*, 204 U. S. 241.

Williams v. *Walsh*, 222 U. S. 415.

Hendrick v. *Maryland*, 235 U. S. 610.

Counsel argue at page 24 of their brief that since it was necessary for appellee to allege and prove all facts necessary to establish his cause of action, it was incumbent upon him to allege and prove facts sufficient to bring his case within statute.

In an effort to support this argument, counsel cite several decisions which deal with causes of action which were *created by* statute.

These cases have no application here. Appellee's cause of action was not created by Section 7137 of Crawford & Moses' Digest. His cause of action against appellant is founded upon the ancient doctrine of *respondeat superior*.

> "The ancient rule of *respondeat superior* was applied *without exception* until 1837. In that year Lord Abriger decided *Priestly* v. *Fowler* and with this case begins the history of the fellow-servant rule." * * *.
>
> McKinney—Fellow Servants, par. 4, page 4.

See also:

> 4 Labatts' Master & Servant, (2nd ed.) par. 1394; page 4008.
>
> *Uravic* v. *F. Jarka Co.*, 282 U. S. 234, 240.

The fellow-servant rule is a part of the doctrine of assumed risk, being based upon the theory that the negligence of the co-servant is one of the ordinary risks incident to the employment, and is assumed by the servant.

> *Union Pac. R. Co.* v. *Fort*, 17 Wall. 553.
>
> *St. L., etc., R. Co.* v. *Triplett*, 54 Ark. 259.

St. L., etc., R. Co. v. *Rice*, 51 Ark. 467.

Under the settled rule in Arkansas assumption of risk is an affirmative defense which is not available to defendant unless specially pleaded.

A. L. Clark Lbr. Co. v. *Johns*, 98 Ark. 211.

It is clear therefore that appellee's action is not founded upon Section 7137 of Crawford & Moses' Digest. The cases declaring the fellow-servant rule provided employers an affirmative defense, the statute simply abolished this defense.

Therefore it was not necessary for appellee to allege or prove facts which brought his case within the statute or any part thereof and the cases cited by appellant have no application here.

We desire to point out, however, that in the quotation from *Chicago, I. & L. Ry. Co.* v. *Hacket* shown at page 24 of appellant's brief the court is discussing the effect of a statute which had previously been declared invalid.

It is argued, however, that since the complaint alleged that appellant was a "foreign corporation, authorized to do business in the State of Arkansas, and is engaged in the business of operating oil and gas wells, producing oil and gas and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas, and in the counties of Ouachita and Union, and at all times mentioned herein was engaged in such business" (R. 3) that such allegation was sufficient to "affirmatively show that appellant was neither a railroad company or engaged in the mining of coal." (Appellant's brief, 18.)

Pleadings, under the rules of common law, on demurrer, are construed against the pleader on the theory that it will be presumed that he has stated his case as strongly as he can.

But this rule was long since abolished in Arkansas by the adoption of the Code.

Bushey v. *Reynolds*, 31 Ark. 657.

Even under the rules of common-law pleading, a liberal construction in favor of the pleader, is adopted after verdict.

Baker v. *Warner*, 231 U. S. 588, 592, 49 Corpus Juris, 115.

"The rule that plaintiff is presumed to have stated his case as strongly as the facts warrant applies only to such facts as are necessary to constitute his cause of action, and does not apply to facts which tend to disclose a defense." Lairy J. in *Pittsburgh, etc., Ry. Co.* v. *Cootman*, 52 Ind. A. 661, 101 N. E. 22, 23. See also *Wabash R. Co.* v. *McNown*, 53 Ind. A. 116, 100 N. E. 283, *Espenlaub* v. *Hedderick*, 53 Ind. A. 139, 100 N. E. 382.

Appellant's contention, as we understand it, is that the allegation that appellant is engaged in business of operating oil and gas wells constitutes an implied admission on the part of appellee that appellant does not operate a coal mine or a railroad even of the short narrow-gauge type described in the Aluminum-Ramsey case.

Many corporations engage in various enterprises. We know of no reason why one could not operate oil and gas wells, and at the same time operate a coal mine, or even a

railroad. Many producers of oil and gas also operate refineries. It would not be unlikely that some of them find it necessary in connection with their refineries to operate small railroads just as the Aluminum Company found such necessary in the operation of its mines. So a statement that a corporation operates oil and gas wells cannot be construed as implying that it does not operate a railroad or a coal mine.

At least under the rules of pleadings prevailing in Arkansas such an allegation in a complaint cannot be erected into an implied admission that such corporation does not operate a railroad or a coal mine.

In the case of *Breming* v. *Lippincott*, 129 Ark. 406, 411, Mr. Justice Humphreys announces the rule for construction of pleadings with reference to implied admissions as follows:

> "It is insisted, however, * * * that the reply and first amendment * * * was a solemn admission * * *.
>
> "Under the rule insisted upon by appellant, the plea must be an *unequivocal admission of facts*, which, if true, precludes recovery."

Although the above case is not cited, the same rule is applied in the case of *Berg* v. *Johnson*, 139 Ark. 243, 249, in which case it was further held that an implied admission in the complaint not necessary to plaintiff's cause of action is not binding on plaintiff in so far as it relates to an affirmation defense, the court at page 250 of the report saying:

> "The allegation in the complaint with respect to the unlawful possession of appellee for two years be-

fore the commencement of the action was not necessary, so far as the length of time of said possession was concerned, to a statement of appellant's cause of action for the recovery of the land, and was included merely for the purpose of setting forth the facts upon which a recovery of the rents and profits could be based. On the trial of the action it would operate as an admission on the part of appellant as to the length of time appellee has been in possession, but she is not conclusively bound by the allegation so far as it relates to appellee's plea of the statute of limitations."

The case of *Sully Trustee* v. *American National Bank*, 178 U. S. 289, relied on by appellant is not in point. This is a companion case with *Blake* v. *McClung*, 172 U. S. 239, and the two should be read together.

The facts of those cases show that the Chancery Court of Washington County, Tennessee, had taken charge of the assets within the State of Tennessee of an insolvent foreign corporation, to administer the same for the benefit of creditors, in accordance with and under the provisions of an insolvency statute of the State of Tennessee.

This statute provided that in the distribution of the assets, creditors who were "residents" of Tennessee should have priority over "residents" of other states.

In the McClung case, Mr. Justice Harlan, at page 247 of the report, says:

"Looking at the purpose and scope of the Tennessee statute, it is plain that the words 'residents of this State' refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when

> absent from that State, to return thereto; such residence as appertained to or inhered in citizenship. And the words in the same statute, 'residents of any other country or countries' refer to those whose respective habitations were not in Tennessee, but who were citizens, not simply residents, of some other State or country."

During the pendency of the general suit Carhart intervened alleging that he was a "resident" of the State of New York.

The decision of this court holding that it was sufficiently established that he was a "citizen" of New York, holds only that since his allegation being in the words of the statute under which the proceeding was authorized, that the words in his pleading would be given the same construction as the same words in the statute.

This decision is but the application of the general rule that on appeal pleadings are to be construed in favor of the pleader, and that he shall be given the benefit of all inferences which may reasonably be drawn therefrom.

In the case at bar appellant is not seeking a liberal construction in its favor of its own pleadings—it is seeking liberal construction in its favor and a strict construction against appellee of appellee's pleading.

The suggestion found at page 20 of appellant's brief that the name "Petroleum Company" negatives the idea that it operates a railroad or coal mine, hardly requires answer. Aluminum Company no more suggests one of these facts than does Petroleum Company—yet such a company operated a railroad. So too did a company bearing the name Minnesota Iron Company, 199 U. S. 593.

The fact that appellee at the time of his injury was not employed in the operation of a railroad or the mining of coal, is not material, since the test is whether or not appellant operates a railroad or a coal mine, the statute making such companies liable to employees of all classes and in all departments without respect to hazard, and this fact does not render the act invalid.

Louisville & Nashville R. R. Co. Co. v. *Melton*, 218 U. S. 36;

Mondou v. *N. Y. H. H. & H. R. R. Co.*, 223 U. S. 1;

Mo. Pac. R. Co. v. *Mackey*, 123 U. S. 205;

Mobile J. & K. C. R. Co. v. *Turnipseed*, 219 U. S. 35;

Ward & Gow v. *Krinsky*, 259 U. S. 503.

3.

RECORD FAILS TO SHOW THAT THE ALLEGED UNCONSTITUTIONAL FEATURE OF STATUTE INJURES APPELLANT.

Not only was it incumbent upon appellant to show that it was of a class entitled to raise the question, but, as is stated in all of the cases quoted and cited in the section next above, the burden rested upon appellant as a condition precedent to its right to question the constitutionality of the statute, to show that the alleged *unconstitutional feature* of the statute injures it.

The record here does not show any injury to appellant by reason of the "alleged unconstitutional feature of the statute." True it may show injury by reason of the statute itself—that is to say that perhaps but for the statute

appellant may not have been held liable in this case. But that liability is on account of the statute, and not on account of the "alleged unconstitutional feature" thereof. The "alleged unconstitutional feature" here complained of is that the statute unjustly discriminates between corporate employers, and individual employers. Appellant contends that the statute should apply to both. If the statute had applied to both at the time of the injury of appellee, appellant would have been subject to the same liability, and the judgment against it would have been no different. So it is readily seen that in so far as the judgment here is concerned, it is not the "alleged unconstitutional feature" of the statute which makes it possible—it is the statute itself.

We can conceive of a state of facts which might be sufficient to establish injury by reason of the "alleged unconstitutional feature" of the statute.

Appellant might have shown at the trial, that in the conduct of its business in Arkansas it had to compete with individuals and partnerships also engaged in the business of producing, saving and marketing oil; that it was forced by economic conditions to sell its oil in the same market, and at the same price as such individual operators; that by reason of the burden placed on it by the statute, its cost of producing such oil was greater that the cost to individual operators, thus making it impossible for appellant to compete on an equal footing with these individual operators.

No such suggestion appears in the record. For aught the record shows to the contrary there is not an individual or a-partnership engaged in the business of producing, sav-

ing and marketing oil within the boundaries of the State of Arkansas.

There is yet another reason why, we think, appellant has failed to show that it is injured by reason of the "alleged unconstitutional feature" of the statute.

It is to be remembered that the basis for the fellow-servant doctrine as disclosed by Chief Justice Shaw in *Farwell* v. *R. Co.*, 4 Met. 49; and quoted with approval by Mr. Justice Harlan in *Hough* v. *Texas and Pacific Railroad Co.*, 100 U. S. 213, 25 L. E. 612, is:

> "The general rule resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services; *and, in legal contemplation, the compensation is adjusted accordingly.* And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is likely to know, and against which he can effectually guard, as the master. They are perils incident to the service, and which can be distinctly foreseen *and provided for in the rate of compensation as any other.*"

Since, therefore, prior to the adoption of the statute, there was the presumption that the servant received additional compensation to justify the assumption of the risk from the negligence of his fellow-servants (which presumption still applies as between individual masters and their servants) why is there not now just the opposite presumption; that in the contract of employment of a servant by a

corporation, the servant's compensation is fixed in a reduced rate, the difference being the compensation to the corporation for assuming responsibility, towards the servant, for negligent acts of the corporation's agents, who will be fellow-servants of the person then being employed? We think such a presumption of law does in fact exist.

Especially is it true in view of the well-established rule that every reasonable presumption must be first indulged in, in favor of the validity of a statute.

6 Ruling Case Law 100.

It is, therefore, to be presumed that at the time of the contract of employment made between Jenkins and appellant that the agreed compensation was fixed at a rate below that usually paid by individual employers to their servants for doing the same class of work, and that such difference in the rate of pay was intended as compensation to appellant, for its agreement to indemnify Jenkins for injury caused by the negligence of his fellow-servants.

If it had received the consideration for its contract, how then can it say that it is injured by reason of being required to perform the obligations assumed by it therein?

4.

THE SELECTION OF CORPORATIONS AS A CLASS FOR APPLICATION OF THE ACT IS NOT ACTUALLY AND PALPABLY UNREASONABLE AND ARBITRARY, BUT RESTS UPON FAIR AND SUBSTANTIAL DIFFERENCE.

Assuming that appellant had shown itself to be within the class entitled to raise the question, and that it had es-

tablished injury on account of the "alleged unconstitutional feature" of the act, still we submit that the act would not be in conflict with the Fourteenth Amendment.

This Court has frequently held that statutes abrogating or modifying the fellow-servant rule are a proper exercise of the police power of the states, and do not violate the due process clause of the Fourteenth Amendment.

Missouri Pacific v. *Mackey*, 127 U. S. 205;
Minn. & St. L. R. Co. v. *Herrick*, 127 U. S. 210;
Tullis v. *Lake Erie & W. R. Co.*, 175 U. S. 248;
Wilmington Star Min. Co. v. *Fulton*, 205 U. S. 60;
Cudahy Packing Co. v. *Parramore*, 263 U. S. 418;
New York Central R. Co. v. *White*, 243 U. S. 188;
Hawkins v. *Bleakly*, 243 U. S. 210;
Middleton v. *Tex. Pac. & L. Co.*, 249 U. S. 152.

It has also been held that in the exercise of this power the states may within certain limits apply such statutes to certain classes of employers and employees, and not to others. Such statutes have been held not to violate the equal protection clause of the Fourteenth Amendment when they apply to

1. Railroad Corporations, but not to natural persons operating railroads, or to other corporations and natural persons generally.

Missouri Pacific Ry. Co. v. *Mackey*, 127 U. S. 205;
Minn. & St. L. R. Co. v. *Herrick*, 127 U. S. 210;
Tullis v. *Lake Erie & W. R. Co.*, 175 U. S. 348;

Chicago K. & W. R. Co. v. *Pontius,* 157 U. S. 209;

Chicago B. & O. R. Co. v. *McGuire,* 219 U. S. 549.

2. Mine Owners and Mining Companies, but not to other employers generally.

Wilmington Star Min. Co. v. *Fulton,* 205 U. S. 60;

Lower Vein Coal Co. v. *Industrial Board,* 255 U. S. 144.

3. Employers working a certain number of men or more (as low as five or more) and not to employers working a less number.

Consolidated Coal Co. v. *Illinois,* 185 U. S. 203;

McLean v. *Arkansas,* 211 U. S. 539;

Jeffrey Mfg. Co. v. *Blagg,* 235 U. S. 571;

Middleton v. *Texas P. L. R.,* 249 U. S. 152;

Ward & Gow v. *Krinsby,* 259 U. S. 503.

The selection of corporate employers, as a distinct class rests upon a fair and substantial difference between corporations on the one hand and natural persons on the other in respect to this common law rule.

In the case of *Frost* v. *Corporation Commission,* 278 U. S. 515, 73 L. E. 483, 488, it is said:

> "Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. *Arkansas Natural Gas Co.* v. *Arkansas R. Commission,* 261 U. S. 379, 384, 67 L. E. 705, 710, 43 Sup. Ct. Rep. 387, and cases cited." 73 L. E. 488.

A very recent case dealing with the question is *Metropolitan Casualty Insurance Co.* v. *Brownell,* 294 U. S. 580, 584.

There, as here, the record was silent as to legislation or other local conditions * * * "bearing on the question," but, as here, the court was "asked to say *a priori* * * * that there can be no reasonable basis for the legislative judgment." Mr. Justice Stone there said:

> "It is a salutary principle of judicial decision, long emphasized and followed by this court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."

Not only does the record here fail to "make known" any fact indicating that the classification is unreasonable and arbitrary, but also those facts which may be "generally assumed" by this court as matters of judicial notice not only fail to preclude the assumption that the classification rests upon some rational basis, but on the contrary justify the conclusion that such classification rests upon a fair and substantial difference.

A study of the history of the fellow-servant doctrine, as it was developed by the many decisions of the American Courts, shows clearly that *Corporations as a class* have

presented perplexing problems peculiar to themselves, in the application of the rule.

It was soon discovered that the application of the original rule in unmodified form would have the affect of relieving corporations from all liability. In an effort to meet this situation certain exceptions to the rule were adopted by the courts. Some of the decisions indicate that certain of these exceptions were intended to apply only to corporations, although such was not the weight of authority. Certain it is, however, that the exceptions were adopted to meet the problem presented by corporations, and there were those who argued that the rule should not apply to corporations at all, or if so, then differently than to individuals and partnerships.

Mr. Labatt in his work on Master and Servant says:

> "The chief influence which has operated in producing this more liberal tendency of judicial opinion has probably been the fact that industrial enterprises have in modern times been falling more and more into the hands of corporate bodies. The harsher aspects of the doctrine of common employment have naturally been brought into clearer relief by this economic situation."
>
> 4 Labatt's Master & Servant, (2d ed.) par. 1394, page 4011.

Mr. Beach in his work on Contributory Negligence, referring to the fellow-servant doctrine, says;

> "Moreover, this question of public policy and general convenience was decided for us in the very infancy of the great corporate interests of the country, when railways were an experiment, and powerful private corporations had not been born. What was sound

public policy before the middle of the century, even if it be conceded that the judges of half a century ago divined it aright, when *Priestley* v. *Fowler* and *Murray* v. *South Carolina R. Co.* were decided, may, in view of the extraordinary change in position as regards employer and employee, reasonably be challenged in 1892. It is quite possible that what was good public policy, then, is not policy in any sense now."

Beach on Contributory Negligence, (3rd ed.) par. 316, page 456.

A short but enlightening discussion of this problem, and the efforts of the courts to solve it is found in Ruling Case Law, where it is said:

"Hardly had the doctrine of fellow service come into general recognition than it became apparent that rapidly changing economic conditions rendered it impolitic—at least in unmodified form. The doctrine was the product of the economic ideals that during the latter half of the nineteenth century sacrified much to commercial interests, and to these same ideals we owe the development of the *corporation* and the enlargement of the sphere of activity of corporate bodies. *The question thereupon arose whether there should be a logical extension of the doctrine to these corporations. If they were to be exonerated from liability for injuries to their employees on the score of fellow service it followed that they could be liable in no case, inasmuch as they must need act and perform their functions through individuals who have a common employer.* Changed ideals dictated a modification of the doctrine. While some courts have protested that the rule in question is too firmly fixed in jurisprudence to be reversed or seriously modified by judicial decision, a great majority, being of the opinion that it works an injustice in its application to the great enterprises of the present day, have been astute to engraft upon it so many

modifications and qualifications that little is left of its original import. *It has been said that the courts have been 'put to mighty labor and bother to administer old rules in the light of changed conditions and to put new wine of interpretation in the old bottles of the law —all with a semblance of preserving it from chaos or radical change.'* The first of the qualifications of the doctrine to be generally recognized was the rule relating to the competency of co-employees. This seems to have satisfied requirements for a considerable time, but still further changes in economic conditions and public policy have dictated the principles of nondelegable duties, superior and inferior employees, and, more recently, different departments."

18 R. C. L. Master & Servant, par. 195, page 716.

A few of the leading cases which point out that the application of the fellow-servant doctrine in unmodified form would have the affect of relieving corporations of all liability are:

Union Pacific R. R. Co. v. *Fort*, 84 U. S. (17 Wall) 553.

Hough v. *Texas & Pac. R. Co.*, 100 U. S. (10 Otto) 213.

Moon v. *Richmond & A. R. Co.*, 78 Va. 745.

Fieke v. *B. & A. R. Co.*, 53 N. Y. 549.

Darrigan v. *N. Y., etc., R. Co.*, 52 Conn. 285.

Since the effect of the original rule was to relieve corporations of all liability for injury to their servants, it certainly would have been proper at that time, and before its modification, for legislative bodies to have denied corporations the benefit of the rule.

It is proper, therefore, to determine whether or not in 1907 when this statute was adopted, the decisions of the Supreme Court of Arkansas had so modified the original rule as to completely eliminate the difference in liability under the original rule between corporate and personal masters.

The "Competent Servant" exception was recognized in the first case in Arkansas. *L. R. & F. S. Ry. Co.* v. *Duffey*, 35 Ark. 602, 613.

In the next case considered (*Fones* v. *Phillips*, 39 Ark. 17) the "non-delegable duty exception" is recognized as applying to both personal and corporate masters. In thus applying this exception to both personal and corporate masters the Arkansas decision is in accord with the overwhelming weight of authority, but it is interesting to note that at least one court of recognized authority had prior to the decision in *Fones* v. *Phillips*, recognized even in the application of the "non-delegable duty exception" a distinction between corporations and personal masters who had not surrendered complete control of the entire business to an agent. That was the Court of Appeals of New York in the case of *Malone* v. *Hathaway*, (1876) 64 N. Y. 5.

In that case a servant employed by a partnership operating a brewery, was killed by reason of the falling of a mashtub on account of the giving away of rotten timbers supporting it. The partners had delegated to a competent carpenter the duty of keeping the premises in repair. The case was tried on the theory that such agent was negligent in this regard. The court denied judgment, Mr. Justice Allen saying:

"Corporations necessarily acting by and through agents, those having the superintendence of various departments with delegated authority to employ and discharge laborers and employees, provide materials and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representative of the corporation charged with the performance of its duty, exercising the discretion ordinarily exercised by principals, and within limits of the delegated authority the acting principal. These acts are in such case the acts of the corporation for which, and for whose neglect, the corporation within adjudged cases must respond, as well to the other servants of the company as to strangers. They are treated as the general agents of the corporation in the several departments committed to their care. *Wright* v. *N. Y. C. R. R. Co., supra; Frazier* v. *Penn. R. Co.*, 38 Penn. St. 104; *Laning* v. *N. Y. C. R. R. Co.*; and *Filke* v. *B. & A. R. R. Co., supra; Coombs* v. *New Bedford Cordage Co.*, 102 Mass. 572; S. C., 3 Am. Rep. 506; *Ford* v. *Fitchburg C. Co.*, 110 Mass. 240; S. C., 14 Am. Rep. 598. A person thus placed by a corporation, in such a position of trust and authority, may be fairly considered as its representative *pro hac vice*. But when the principal is an individual acting *sui juris*, and there is no evidence of surrender of power and control to any subordinate, and is present himself superintending the establishment in person, no such presumption arises, or responsibility attaches in respect of the acts of a competent and proper foreman, selected by and in the employment of the principal."

It will be seen, therefore, that from a very early date corporations have been treated as a separate class in the application of the fellow-servant doctrine.

While prior to the adoption of the statute of 1907, the Supreme Court of Arkansas had recognized the "competent

servant exception" and also the "non-delegable duty exception" it had definitely rejected the "separate department exception" (*Triplett* v. *Railway,* 54 Ark. 289), and as we interpret the decisions had also rejected the "superior servant exception," holding that the master was liable for the acts even of vice principals only in connection with the breach of a non-delegable duty.

There is an irreconcilable confusion not only between the decisions of the various states, but often between different decisions of the same state upon the "superior servant exception," and there are almost as many variations and shadings of the rule as there are decisions. In the main, however, the decisions may be grouped in three general classes, as follows:

1. Where the rule is rejected, and the liability of the master for the acts of his agents, of whatever rank, is held to be exactly commensurate with the positive duties of the master. This is sometimes designated, and we shall hereafter refer to it as the New York Rule because the case of *Crispin* v. *Babbit,* 81 N. Y. 522, is a leading exponent of the rule.

2. Where it is held that the master is under duty to superintend and control the work, and negligence in this regard committed by any person superior to and directing a subordinate is the negligence of the master. This is often designated, and we shall hereafter refer to it as the Ohio Rule, because it was first announced in that state in the cases of *Little Miami R. Co.* v. *Stevens,* 20 Ohio 415, and *Cleveland C. & C. R. Co.* v. *Keary,* 3 Ohio St. 201.

3. Where the master is held liable for all acts of one who stands in the position of vice principal, as the directing head of the master's business, or a separate and distinct department thereof; but liable for acts of superior servants of lower rank only with respect to the breach of a positive duty of the master. This rule has sometimes been called, and we shall hereafter refer to it as, the vice principal rule, and is the rule which was finally adopted by the Supreme Court of the United States.

Although statements may be found in some of the opinions which could be construed as applying either of the last two of the rules mentioned above, we believe that a consideration of the Arkansas decisions as a whole justifies the conclusion that at the time of the adoption of this statute the New York rule was in effect in Arkansas. As a matter of fact it would not require strained construction of the decisions to reach the conclusion that the Arkansas rule was even stricter than the New York rule; that is to say that like under the New York rule a master could only be liable for the breach of a positive duty—but in addition to that rule the further condition was imposed that such breach of a positive duty must be the act of one who occupied the position of vice principal.

Fones v. *Phillips* (1882) 39 Ark. 17, was the first case dealing with the question. In that case the court recognizes the "non-delegable duty" exception, but it specifically rejects the "vice-principal or superior servant" exceptions, in unmistakable language.

Since this decision is cited with approval in nearly all of the subsequent cases, some of which may appear to be

consistent with the "superior servant exception" we take the liberty of quoting from it at length. At page 26 of the report Mr. Justice Eakin says:

> "Indeed the English and American cases are not easily reconcilable. The former go to the extent of holding all to be fellow-servants, within the rule, who are engaged in the prosecution of the same business, under the same master, and receiving wages from the same source, *however different the grades of their services may be, and however the labor of some may be under the direction and control of others, unless the master has transferred all his authority to the servant guilty of the negligence.* The American cases present less uniformity, and in some of them it has been held that a superior employee, intrusted with the control of inferiors, although himself an employee, may so represent the master and stand in his place, as to make him answerable for negligence to persons injured thereby, although the master may retain general authority over all. In the language of *Mr. Wharton,* who cites the cases in the notes to *section* 235 of his work on *Negligence,* 'the liability of the master for the middle-man's negligence, has been pushed so far as to make the master liable to a servant for all injuries inflicted by fellow-servants who were in a position superior to, or beyond the influence of the injured party.'
>
> "Upon the examination of a number of these cases, we think with Mr. Wharton, that the line of distinction between the cases where the employer is liable to an employee for injury resulting from negligence of a fellow-workman, and those where he is not, can be traced along this principle. *That is that the general rule is recognized here as in England, but that 'where a master is required to perform specific duties to his servants, he is liable for negligence in the discharge of such duties, no matter who may be the agents through whom he acts.*"

The learned Justice then reviews at length some of the leading American cases including those adopting the so-called "New York Rule" and those following the so-called "Ohio Rule" together with the comments of many text-writers, and adds:

> "*Mr. Wood* in his work on *Master and Servant, page* 860, extracts from all the cases, the following rule: 'Whenever a master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of these duties by the middleman, he stands in the place of the master; *but as to all other matters, he is a mere co-servant*, and the question is not whether the master reserved oversight and discretion to himself, but whether he did in fact clothe the middle-man with power to perform his duties to the servant injured.' This seems to us to embrace all the conditions under which, by the current and superior weight of authority, the master has been held liable for the acts of negligence of one employee, by which another has been injured."

Fones v. *Phillips* was cited with approval in the case of *St. L. I. M. & S. Ry. Co.* v. *Harper* (1884) 44 Ark. 524, where it was held that a corporation was liable for negligence of its master mechanic and shop foreman in failing to discharge the non-delegable duty of the master to properly inspect and repair a defective boiler.

Railway v. *Gaines* (1885) 46 Ark. 555, held that a brakeman and car inspector were fellow-servants, and the former could not recover for injury received by reason of a defective draw head, which it was alleged was not dis-

covered by reason of the want of proper inspection on the part of the car inspector. There can be no doubt that it was one of the positive duties of the master to make suitable inspection to discover this defect. *Union Pacific R. Co.* v. *Snyder*, 152 U. S. 684. Notwithstanding this fact recovery was denied on the ground that the car inspector was not the head of a department. It would seem, therefore, that this decision further narrowed the rule of *Fones* v. *Phillips* and established the rule that a master was liable only for the breach of a non-delegable duty, and then only where the neglect of such duty was the act of a general agent of the company in charge of a separate department or larger division of the master's business.

This narrow rule was re-affirmed in the case of *Railway* v. *Rice* (1888) 51 Ark. 467, 480, *where the court said:*

> "While we recognize the liability of the railway company for the willful or negligent default of its chief inspectors, and those deputed to supervise the condemnation of unsuitable tools, rolling stock, etc., we cannot assent to the proposition that every yard inspector on the line of a railroad is a vice principal. Upon what we conceive to be the soundest principles, and the weight of authority we hold that the appellee and the yard inspector were fellow-servants, and hence that appellee had no cause of action against the appellant."

This language shows clearly that the rule of the court at that time was that the master was liable for the negligence of a head of a department only in respect to a positive duty of the master, and for the negligence of an agent of a lesser rank not at all.

Railway v. *Triplett* (1891) 54 Ark. 289, seems to return to the doctrine of *Fones* v. *Phillips,* and holds that the liability of a master for the acts of his agents of whatever rank or grade "is precisely commensurate with the master's personal duties." At page 297 the court quotes with approval a statement of Judge Dillon as follows:

> "The real inquiry is: *Was the injury caused by another servant one of the ordinary risks of the particular employment?* If so, the mere grade, whether higher, lower or coordinate, or the department of the faulty servant, is of no consequence.
>
> "It is a condition of contract of service that the servant takes upon himself the risk of accidents in the *common course of the business,* all open and palpable risks, including the negligence of all fellow-servants of whatever grade in the same employment.
>
> "The true inquiry in each case, is: Was the accident one of the normal and natural risks in the ordinary course of business? If so, then there is no common law liability on the part of the employer; if not, there is such liability; and the inquiry, except as it bears on the above, is not one of grades or departments. This is the final form the doctrine has assumed, and it is the correct one. It is plain, intelligible and practical. It is founded upon just principles, *viz.,* that it is *precisely commensurate with the master's personal duties.*"

The General Assembly of Arkansas, at its 1893 session, no doubt, taking cognizance of the decision in *Railway* v. *Triplett* denying both the superior servant and the separate department exceptions, adopted a statute, declaring these exceptions, in so far as railway corporations were concerned. This was the Act of February 28, 1893, which was later carried into Sandels & Hill Digest of the Statutes

of Arkansas, and appeared as sections 6248 to 6250 thereof. This statute reads as follows:

"6248. All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this State, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employee, in the performance of any duty of such employee, are vice-principals of such corporation, and are not fellow-servants with such employee.

"6249. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employees, are fellow-servants with each other; *provided,* nothing herein contained shall be so construed as to make employees of such corporation in the service of such corporation fellow-servants with other employees of such corporation engaged in any other department or service of such corporation. Employees who do not come within the provisions of this section shall not be considered fellow-servants.

"6250. No contract made between the employer and employee based upon the contingency of the injury or death of the employee limiting the liability of the employer under this act, or fixing damages to be recovered, shall be valid and binding."

Several cases which involve causes of action accruing before, but which were not decided until after the adoption of the statute, are to be found in Vol. 58 of the Arkansas Reports.

The first of these cases is *Bloyd* v. *Railway Company*, 58 Ark. 66. Here a servant was employed in a crew of bridge repairers, in charge of one Munden, who had control over the bridge crew, and who also had control of the crew operating a work train used in connection with the work. Bloyd in the discharge of his duties was directed by Munden to go across the trestle, and while he was doing so Munden directed the train to move forward, and the injury resulted.

Classification of this decision is difficult. In it may be found language indicating persuasion in favor of the Ohio Rule; again it deals with the question as if it were applying the vice principal rule of the Supreme Court of the United States, but it finally returns to the New York Rule and holds that the negligence was in respect to a positive duty of the master.

While the court cites *Cleveland etc R. Co.* v. *Keary*, 3 Ohio St. 201, and other cases which adopt the Ohio Rule, it does so only in support of its declaration that the distinction between a vice principal and a mere foreman depends not upon the extent and magnitude, but rather upon the nature of the work of which the offending servant has charge.

The court then refers to the ruling in the case of *B. & O. R. Co.* v. *Baugh*, 149 U. S. 368, which held, that in order for one to be a vice principal he must be "clothed with control and management of a distinct department," and applying that rule the court says: "Munden had charge of such work as might well be called a separate branch of defendant's business."

The court then says:

> "It is held, however, in the Baugh case that the question as to a master's liability to his servant for the negligence of another servant does not turn merely on the matter of subordination and control, but depends rather on whether the act of alleged negligence is done in discharge of some positive duty of the master to his servant."

It will be seen, therefore, that the decision rests finally upon the ground that the injury was the result of negligence in respect to a positive duty of the master.

That the court had no intention of overruling or modifying the established rule of *Fones* v. *Phillips* is clearly shown by the fact that such case is cited in the outset of the opinion as authority for the following statement.

> "* * * the material question is whether Munden was a mere foreman, overseeing a gang of laborers, or was an agent of the company, clothed with its authority in the management and supervision of such part of its business as to make him the company's representative. If he occupied the former position, the laborers had assumed the risk of his negligence; but in the latter case he was a vice-principal, and if he was guilty of negligence *in that capacity* the company is liable."

The words "in that capacity" taken in connection with the citation of *Fones* v. *Phillips* have peculiar significance, for it was pointed out in the former case that one is acting only in the capacity of a vice principal when he is discharging a positive duty of the master.

It may be that what was there declared to be a non-delegable duty would not be so considered by many of the courts, although it appears to us that the facts of the case

present a situation where there was a failure to protect the servant against the happening of an occurrence which exposed him to an extraordinary transitory peril against which the servant had no means to guard himself, and which Mr. Labatt says "may well be regarded as a form of the non-assignable duty to furnish and maintain a safe place of work. (4 Labatt's Master & Servant (2d ed.) par. 1471, page 4308). But even if the court was in error in holding that Munden was performing a positive duty of the master, this would be only a mis-application of the rule, and in no sense an abandonment of the rule.

There is reason for the belief that in this case the Court was returning to the stricter rule of *Railway* v. *Gaines, supra,* for the court seems to have considered it necessary to find not only that there was a breach of a non-delegable duty, but that such was the result of negligence of a vice principal—and it did find that each condition had been met by the evidence.

If the decision in the Bloyd case could be said to indicate abandonment of the prior rule, later cases show clearly that such was not the intention of the court.

In *Railway* v. *Barry,* 58 Ark. 198, 204, it is said:

> "Under the circumstances of this case, the movements of the trains being under the direction and control of the train dispatcher, in directing and controlling their movements he was *performing the master's duty,* and was not a fellow-servant with the plaintiff, but the representative of the company, for whose negligence, if any, resulting in injury, the company is liable."

That in directing the movements of trains the train dispatcher is performing a positive duty of the master cannot be doubted. Mr. Justice White, dissenting, in the case of *Northern Pacific R. Co.* v. *Dixon,* 194 U. S. 338, 352, says:

> "Indeed, elaboration to show that a train dispatcher * * * in the discharge of his functions, performs a positive duty of the master, is unnecessary, since the opinion of the court in this case proceeds upon the assumption that such is the case."

In the case of *Fordyce* v. *Briney,* 58 Ark. 206, 213, Mr. Justice Mansfield, who also wrote the opinion in the *Bloyd case,* says:

> "On the first of these questions, the fourth instruction of the court was to the effect that 'if it was the duty of the plaintiff, as car repairer, to work under the authority and control of the car inspector,' and he was so working at the time he was injured, then the car inspector was not his fellow-servant. This was error. There was no evidence that Hickey, the car inspector, sustained to the car repairers any relation other than that of a mere foreman directing their labors; and the possession of such authority as that implied did not make him the representative of the defendant. *Fones* v. *Phillips,* 39 Ark. 39; *Bloyd* v. *Railway Co., ante* p. 66. The first clause of the sixth instruction is equally objectionable, on the same ground. *And in this connection it is proper to say that there was no evidence tending to show that Hickey was charged with the duty of performing any act looking to the safety of the place where the plaintiff was directed to work.*"

Again in the case of *Railway Company* v. *Torrey,* 58 Ark. 217, 227, Mr. Justice Mansfield says:

> "As already indicated, we are not prepared to hold that the court was right in assuming that there

was evidence from which the jury might have found the existence of facts sufficient to make the foreman a vice-principal. Conceding, however, for the purposes of this opinion, that there was such evidence, the fourth instruction was not in other respects correct. It told the jury that the plaintiff was entitled to recover if it was shown that he was negligently and carelessly ordered 'by the foreman to a dangerous position, and that while occupying that dangerous position, and by reason thereof and said order, he was injured, while he himself was exercising due care.' This was too general. The court should have stated, as far as it was practicable to do so, the facts, which, if proved, would make the order negligent; *and these facts must have been such as involved a failure to perform some duty which the defendant company owed to the plaintiff as its servant.*"

The case of *Fort Smith Oil Co.* v. *Slover*, 58 Ark. 168, declares it to be one of the master's positive duties to instruct and warn an inexperienced servant of hidden dangers, and adds:

> "If Burke had the power to employ and discharge laborers in his department, and he was the foreman in his department, *the duty of the master to instruct, if he owed that duty to Slover, devolved on Burke.*"

The judgment in the case of *Railway Company* v. *Hammond*, 58 Ark. 324, was reversed on the ground that the evidence did not support the specific acts of negligence alleged. There a servant employed in a rock quarry, and at the time on a hand car was run over and killed by a freight train, the three grounds of negligence were (1) failure to notify the superintendent of the quarry of the running of the train (2) negligence of the engineer in not sounding the whistle (3) negligence of the superintendent in placing the

servant on the hand car. The court found that the company was not negligent in any of these particulars, but the record suggested that there might have been negligence in failing to put out flag signals so as to notify the engineer of the presence of the car on the track, and leave was granted to the plaintiff to amend his complaint. If there was a duty to put out these signals it was unquestionably the duty of the master since it is a part of the non-delegable duty to furnish and maintain a safe place to work.

All but two of the cases considered by the court involving an injury occurring after the statute of 1893, and before the Act of 1907 were railroad cases, and controlled by the prior statute.

One such case is *Stretcher Cooperage Works* v. *Steadman*, 78 Ark. 381, decided April 16, 1906. Here a servant was killed by the sudden bursting of a fly wheel. The court without citing any authorities or giving any explanation for its decision disposes of the question in these brief words:

> "The evidence does not clearly show what was the cause of the accident. There was some evidence tending to show that it was caused by running the machine at too high a speed. It is also possible that the wheel may have been slightly out of balance, but this is by no means clear. If the accident was due to the fact that the machinery was through carelessness of the foreman of defendant run at great and unusual speed, or to the fact that through the carelessness of the foreman the wheel was being operated while it was out of balance, then the company would be liable, for we see nothing in the evidence tending to show that Steadman was guilty of contributory negligence, and he did not assume any risk due to the negligence of the foreman of the company, who was not his fellow-servant."

Admitting, as we must, that this decision is far from satisfactory, and considered alone would leave the rule in doubt, yet since it did not expressly overrule the prior decisions, it must, if possible be construed in harmony therewith. The duty to exercise due care to maintain the wheel in balance was, of course, a positive duty of the master. The operation of the machinery at a high and dangerous speed, if only a temporary condition, might properly be a mere detail of the work, and the act of the foreman, on the other hand if the speed was the usual and customary speed at which the machinery was continually operated, by the order of, or with the implied consent of the master then it constituted a method of work and was the master's act. Then too under the doctrine that it is the positive duty of the master not to expose his servants to extraordinary peril, the court might have found that in this case where a wheel was out of balance the duty rested upon the master to determine the maximum speed at which it should be operated, and that duty at the time being discharged by the foreman he was performing the act of the master.

A case decided only a few months prior to the adoption of this statute shows clearly that the rule in Arkansas was that a master was liable for the negligence of a vice principal only in respect to a positive duty.

Archer Foster Con. Co. v. *Vaughn* (May 7, 1906) 79 Ark. 20, 23, was a case where a servant engaged in a dynamite crew, under the direction of one Lynch as superintendent, who not only directed the men but personally placed the dynamite in the holes, was injured by an explosion of dynamite which had been placed in a hole by Lynch. Mr. Justice Wood says:

> "* * * there was evidence to justify the conclusion that Lynch was vice-principal of the appellant. * * * Now, the labor of drilling and of loading dynamite in the holes and of blasting same was all to a common purpose, and all who were engaged therein were fellow-servants. * * * This would include Lynch, the vice-principal, while he was doing the labor of drilling or loading the dynamite into the holes, and for an injury which resulted from his negligence in these particulars the master would not be liable."

We submit that an analysis of the above cases discloses that prior to the adoption of the act now under consideration the Supreme Court of Arkansas had not adopted the superior servant rule in any form. It certainly had not adopted the Ohio rule, and while in nearly all of the cases, from the Bloyd case down, some reference is to be found with respect to the question of whether or not the offending servant was a vice principal, such language does not indicate that the court was accepting the vice principal rule as it was generally understood. On the contrary the decisions indicate that the court conceived the law to be not only that the negligence must be in relation to a positive duty of the master, but in addition thereto the breach of this duty must be the act either of omission or commission of some agent occupying a position of the rank of a vice principal. In other words, the decisions instead of enlarging the master's liability under the vice principal exception, further contracted his liability under the non-delegable duty exception, by engrafting upon this exception a condition that even in respect to those duties the negligence must be that of a vice principal.

Certain it is that there is reasonable basis for interpreting the Arkansas decisions as limiting liability of the

master for the act of his agents of whatever rank to cases involving a breach of a non-delegable duty, and the Legislature was justified in adopting this construction when it came to legislate upon the subject, and so enact legislation to remedy the evil disclosed by the decisions as it so construed them. Under such construction of the cases the evil which the Legislature sought to remedy is readily apparent.

The directors, general superintendent, or other managing agents of corporations are regarded as vice principals (39 C. J. 587).

Since a corporation can act only through agents, and since the highest ranking agent it can designate is still only a vice principal, and since it was liable for the acts of such vice principal only in respect to positive duties which it owed to its servants, *it follows* that *at the time of the passage of this statute, a corporation, (solely because of its corporate character) was relieved of all liability for injury to its servants except for the breach of some personal, positive, and non-delegable duty.*

The original rule, as we have seen, exempted *corporations as a class* from all liability for injury to servants. The rule in Arkansas in 1907, as modified by Arkansas decisions, still relieved *corporations as a class* from all liability except for the breach of some non-delegable duty.

Such was not then, and is not now, the rule with respect to individual masters.

> "902. (10) Master liable for his personal misconduct of whatever kind it may be.—There is no exception to the rule that the violation by the master

himself of any of the duties enumerated in the foregoing sections constitutes a cause of action in favor of a servant who is injured thereby. A *prima facie* right to indemnity exists, therefore, whether the master's culpability was, under the doctrine prevailing in the jurisdiction where the accident occurred, one appertaining to the performance of a duty belonging to the *nondelegable* class, or a *mere detail of the work.* An obvious corollary of this principal is that the defense of a common employment is not available where the person whose negligence caused the injury is a partner of the defendant, as well as a fellow-workman of the injured person."

3 Labatt's Master & Servant, (2d ed.), par. 902, page 2396.

In 1907, at the time of the passage of this act here in question, *there existed a marked distinction in the application of the fellow-servant rule, between individuals, partnerships, and unincorporated associations on the one hand and corporations on the other.* Three or more men operating as a partnership or an association could be held liable for an injury to a servant caused by a negligent order given to the servant by one of the partners in regard to a mere *detail of the work*—while on the other hand in the case of three or more men operating a like business, as a corporation—neither they nor the corporation could be held liable under the same conditions, even though one of the incorporators as the executive officer thereof himself gave the command.

Although appellant is not itself a small corporation, it complains of the statute chiefly because of what it conceives to be discrimination against the corporation carrying on a small industry of the type usually carried on by a

partnership. Such are the illustrations given at pages 40 and 41 of counsel's brief, and they also quote at length from *Bedford Quarries* v. *Bough*, which case holds a similar statute unconstitutional largely, if not entirely, on the ground that it did not afford equal protection to the small corporation. The illustration which we have cited in the preceding paragraph shows that in Arkansas prior to the statute there existed inequality in the application of the fellow-servant rule in favor of corporations and against partnerships, which was more clearly manifest, and doubtless most frequently occurred, in cases of the small industry.

In the application of the fellow-servant doctrine as established and declared by the Arkansas court at the time of the adoption of this statute, corporations constituted a separate and distinct class. The Legislature did not create the class, it merely recognized it, and enacted a statute dealing with the class, which rested upon a difference which bore a reasonable and just relation to the legislation thus enacted. Such an act meets every requirement of the equal protection clause of the Fourteenth Amendment.

If it be said that, although the statute abolished the distinction then existing it created a new and different one, the answer is that once the right to classify is shown, the details of the legislation and the exceptions to be made are in the sound discretion of the Legislature.

Watson v. *Maryland*, 218 U. S. 173, 54 L. E. 987;

Griffin v. *Connecticut*, 218 U. S. 563, 54 L. E. 1151.

The superior servant rule, whether in the broad form of the Ohio rule, or the more limited form of the [redacted]ice prin-

cipal rule, was invented to meet the economic changes caused by the substitution of corporations for natural persons in commercial enterprises. Not only that, as appears from statements to be found in the decisions and text books, there was in fact a question as to whether, in this regard, there should not be one rule applying to corporations and a different one to natural persons, and some of the courts and text writers answered that question in the affirmative.

While Mr. Beach in his work on Contributory Negligence answers this question in the negative he admits the existence of the question saying:

> "Should there be one rule in this particular applicable to corporations and another less stringent one applicable to other defendants?—The constructive or presumed presence of the corporation in the acts of its servants is a favorite doctrine with some judges and text writers. Under the influence of this theory, in some jurisdictions there is attempted a distinction in this regard between a corporation and a natural person. Inasmuch as bodies corporate can, from their very nature, act only through an agent it is urged that, unless this executive agent is to be deemed for the purposes of this rule the corporation itself, there will result in favor of the corporation an immunity which is denied to men who carry on their business in person."

Beach on Contributory Negligence, (3rd ed.), par. 329, page 472, citing 1 Redfield on Railways 310;

Patterson v. *Pittsburg, etc. R. Co.*, 76 Penn. St. 389;

Buckner v. *N. Y., etc. R. Co.*, 49 N. Y. 672;

Cumberland, etc. R. Co. v. *Moran*, 44 Ind. 283.

While the two cases first establishing the Ohio rule did not limit its application to corporations, the opinions suggest that such a limitation would not be improper.

Railway v. *Stevens*, 20 Ohio 416, 438;

Railway v. *Keary*, 3 Ohio State 201, 210.

Kentucky adopts a modified form of the Ohio rule, and limits its application to corporations, on account of the constructive and presumed presence of the corporation in the acts of its servants.

Louisville & N. R. Co. v. *Collins*, 2 Duv. (Ky.) 114.

Judge Redfield approves the doctrine of the Kentucky case, *Redfield on Railways*, page 569, and bases his approval upon the fiction of the constructive presence of the corporation, which he points out is consistent with the conclusion reached by him at pages 547-549 of the same work, with respect to liability of corporations for willful wrongs at which point the learned Judge said:

> "But in some cases it has been held * * * that a corporation is not liable for the willful acts of its agents, unless done with the assent of the corporation. * * *
>
> "But they (these cases) seem to have lost sight of, or not sufficiently to have considered, * * * that the superior is virtually always present, in the person of any of the employees, within the range of the employment, as much as is practicable in such cases. And this consideration, in regard to natural persons, is held sufficient to make the superior liable for the act of the subordinate, whether done negligently or willfully."

In *Patterson* v. *Pittsburg, etc. R. Co.*, 76 Pa. 389, 394, it is said:

"The plaintiff's offer met this requirement. He proposes to prove that he notified the superintendent and foreman of the dangerous character of the switch in question. It is objected however that this would not be sufficient, because notice to a subordinate, however extensive his authority, is, after all, but notice to a fellow-servant, and therefore not binding on the master. In ordinary cases such is undoubtedly the rule, but its strict application in the case of *corporations* * * * is impracticable."

The opinion of Mr. Justice Field in the case of *Chicago, etc., R. Co.* v. *Ross*, 112 U. S. 377, shows clearly not only that the superior servant rule was invented to meet the situation presented by corporations, but we think the opinion is subject to the construction that such rule applies only in the case of corporations. The learned Justice says:

"There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence."

If it was not intended to limit the rule to corporations, then the words "of a corporation" used twice in the quotation are mere surplusage, and if stricken out the quotation would state the rule as applying to servants of all masters whether corporations or natural persons.

That the opinion intended to limit the rule to corporations is further borne out by the fact that it quotes from *Malone* v. *Hathaway*, 64 N. Y. 5, which case, as we have previously pointed out, makes a distinction in the application

of the nondelegable duty rule, as between corporations and natural persons. Further support of this construction is found in the fact that the opinion also cites and quotes from *R. R. Co.* v. *Collins*, 2 Dur. (Ky.) 114, as well as the comments thereon made by Judge Redfield, which case and text make a sharp distinction in the application of the rule between corporations and natural persons.

It is true that the Ohio rule, which seems to have been accepted in the Ross case, was contracted into the vice-principal rule by the opinion of Mr. Justice Brewer in the case of *B. & O. R. Co.* v. *Baugh*, 149 U. S. 368, but it is not suggested in that case that the new or modified rule there established applied to other than corporate employers.

In fact in a still later opinion by Mr. Justice Brewer it seems to be taken as settled that both the superior servant rule and the separate department rule, as each are approved in modified form by the Supreme Court of the United States, apply only to corporations. The learned Justice says:

> "But where the employer is a railroad *or other corporation* having a large number of employees, sometimes engaged in different departments of service, certain limitations or qualifications of this general rule have been prescribed."
>
> *Northern Pac. R. Co.* v. *Dixon*, 194 U. S. 338, 343.

Since, therefore, some jurisdictions applied the fellow-servant doctrine differently as between corporations and natural persons, so that in fact there was a different rule for each class it would have been proper for the legislative power within these jurisdictions to recognize these separate rules, and legislate as to one without disturbing the other.

In jurisdictions like Arkansas, where the rule was applied uniformly between the two classes, but the certain well-recognized exceptions to the rule, particularly applicable to corporations had not been adopted, the legislative power could determine (1) whether such exceptions should be adopted, and if so (2) should they be made to apply to corporations or to both corporations and natural persons.

If the above premise is correct, then it follows that the right to treat corporations as a separate class for legislation in respect to the fellow-servant rule is established, and as to them the rule may be completely abrogated.

The sole ground of complaint against this statute is that it does not include natural persons, who may be engaged in a similar business to that being carried on by a corporation. The equal protection clause of the Fourteenth Amendment does not require mathematical nicety, nor that a state shall regulate all or none.

Mr. Justice Stone says in the case of *Silver* v. *Silver*, 280 U. S. 117, 123:

> "* * * there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none. (Citing cases.) In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. (Citing cases.) *It is enough that the present statute strikes*

at the evil where it is felt, and reaches the class of cases where it most frequently occurs."

Mr. Justice Holmes says in the case of *Central Lbr. Co.* v. *South Dakota*, 226 U. S. 157, 160:

> "If a class is deemed to present a conspicuous example of what the Legislature seeks to prevent, the 14th Amendment allows it to be dealt with, although otherwise and merely logically not distinguishable from others not embraced in the law."

Mr. Justice Holmes says in *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411:

> *"Again, if an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation."*

The evil which the Legislature here sought to remedy is made clear by the language of Mr. Justice Monks in the case of *Bedford Quarries Co.* v. *Bough*, 168 Ind. 671, where he says: "It cannot be denied, however, that in present industrial conditions, the co-servant doctrine * * * has, when applied to the facts of many cases, become arbitrary, rather than a reasonable rule of law."

This evil was specially experienced in cases where the master was a corporation. It was these cases which presented a conspicuous example of the evil, and it was here where the evil was most severely felt and most frequently occurred.

This evil was all the more glaring in Arkansas because of the lack of the superior servant exception and the separate department exception, two qualifications of the general rule which had been applied in other jurisdictions in an effort to correct, to some extent at least, the evil presented by the corporation in the application of the rule.

Nor can it be said that the acceptance of these exceptions would have corrected the evil. Certainly not if the superior servant exception had been accepted only in the limited form of the vice principal rule (and the most liberal interpretation of the Arkansas cases would go no farther than this) for corporations usually carry on their work by, and present a conspicuous example of that method of work which subjects servants to the supervision and control of foremen and other directing overseers, who as a rule do not occupy a position of the rank of a vice principal, but to whom the servants must yield absolute obedience.

It cannot be said, however, that even in those jurisdictions which had accepted all four of the exceptions in their most liberal form, that all of the evils incedent to applying the fellow-servant doctrine in favor of corporations had been eliminated. Certainly this court cannot say *a priori* that the evil in a rule of law, which in its inception was so broad as to completely relieve corporations from liability for injury to their servants, had been fully remedied by four exceptions which made them liable under certain specific circumstances, and which exceptions were constantly undergoing change by reason of frequent interpretations and applications thereof in the decisions, so much so that the law was in a constant state of flux.

The Legislature may have believed that as between a servant and a personal master, who were ordinarily in daily contact with each other, so that the master could feel a moral responsibility for the servant's safety, and the servant could directly, orally, and with the full assurance that his report would be held in strict confidence, report to the master that a fellow-servant, even his immediate superior, was negligent or incompetent; the competent servant exception was sufficient safeguard. But it may have found that in case of a corporation, acting only through agents with the management often far removed from the scene of active operations, the personal contact of the servant with the corporation being only through his immediate superiors, themselves fellow-servants, having no right to hire and fire, and whose knowledge of a servant's incompetency would not constitute notice to the corporation, so that in order to charge the company with notice the servant would have to report in writing to some officer having power to hire and fire, thereby making it less likely that the report would be kept secret and the servant protected, the situation was so different that the common-law rule did not afford ample protection.

Likewise, the Legislature may have found that generally in Arkansas corporations were engaged in that type of business which carried with it increased hazard to their employees, such as manufacturing, mining, operating railroads, street cars, electrical systems, gas lines, etc., while as a general rule the individual employer was engaged in business where his employee was relatively safe; such as agriculture, the trades, etc.

The Legislature may have found that ordinarily corporations operated large enterprises, employing many men, in separate departments, while as a rule the business of an individual employer was small and confined to one unit.

If the Legislature found such differences, it could in its judgment make a choice of method to guard against the evil.

Metropolitan Casualty Ins. Co. v. *Brownell,* 294 U. S. 580;

Standard Oil Co. v. *Marysville,* 279 U. S. 582, 584, 73 L. E. 856, 859;

Hardware Dealers' Mut. F. Ins. Co. v. *Glidden Co.,* 284 U. S. 151, 158, 76 L. E. 214, 219.

It could likewise decide whether the differences were general enough as respects corporations, to call upon it to say whether the provisions of the act should be applied to them as a class rather than to members of it selected by more empirical methods.

Metropolitan Casualty Co. v. *Brownell, supra;*

Ohio ex rel. Clarke v. *Deckebach,* 274 U. S. 392, 71 L. E. 1120;

Westfall v. *United States,* 274 U. S. 256, 259, 71 L. E. 1036, 1037;

Silver v. *Silver,* 280 U. S. 117, 123, 74 L. E. 221, 225.

The cases of *Ballard* v. *Mississippi Cotton Oil Co.,* 51 Miss. 507; *Bedford Quarries Co.* v. *Bough,* 168 Ind. 671, and *Chicago etc. R. Co.* v. *Westby,* 187 Fed. 619, relied on by appellant, are all based upon the theory that the equal protection clause requires that a statute include every class to

which it might be applied. Such is not in accord with the decisions of this Court.

Appellant concedes that the question decided by the Circuit Court of Appeals for the Eighth Circuit in the case of *Railway* v. *Westby, supra,* is not the same as the question presented here. That case is evidently presented by appellant, because it cited and quoted from *Ballard* v. *Mississippi Cotton Oil Co., supra,* and appellant conceives this to show by implication that the Circuit Court of Appeals for the Eighth Circuit approves the decision in the Ballard case holding that corporations do not present a proper class for separate legislation in respect to this rule.

Even if this were so, which we do not concede, a later decision by the same court implies just the opposite—a decision which deals with the same statute under consideration here—for in the case of *Keammerling* v. *Athletic Min. & Smelting Co.,* 2 Fed. (2) 574, that Court extended the application of the doctrine of *res ipsa loquitur* to cases between corporate master and their servants solely because of the very statute here in issue. Section 7137 of Crawford & Moses' Digest of the Statutes of Arkansas.

Although the decision in the case of *Power Mfg. Co.* v. *Saunders,* 274 U. S. 294, relied on by appellant, points out that the statute then in question prescribed a different rule of practice for foreign corporations than that prescribed for domestic corporations and individuals, the true vice of the statute was the distinction made between the two classes of corporation. This is clearly demonstrated by the later case of *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, where a similar statute which applied alike to both

classes of corporations but not to natural persons was upheld.

In the case of *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, it was held that a statute, requiring corporations, domestic and foreign to furnish to an employee who is discharged or voluntarily leaves the employment a service letter, is not repugnant to the equal protection clause, because such statute did not include individual employers.

A few of the cases which we think are applicable here and which have not been previously referred to are:

Crescent Cotton Oil Co. v. *Mississippi*, 257 U. S. 129;

Fort Smith Lbr. Co. v. *Arkansas*, 251 U. S. 532;

Mallinckrodt Chem. Works v. *Missouri*, 238 U. S. 41;

Hammond Packing Co. v. *Arkansas*, 212 U. S. 322;

Skinner v. *Garnett G. M. Co.*, 96 Fed. 735.

ASSUMING THAT APPELLANT MAY NOW RAISE QUESTION THAT ACT IS INVALID AS TO FOREIGN CORPORATIONS SPECIALLY, IN SPITE OF FACT THAT IT ASSIGNS ERROR SOLELY ON GROUND THAT ACT IS INVALID BECAUSE IT DENIES EQUAL PROTECTION TO ALL CORPORATIONS, SUCH GROUND IS UNAVAILING FOR IN ALL EVENTS ACT IS VALID AS TO DOMESTIC CORPORATIONS UNDER STATE'S RESERVED POWER TO AMEND CHARTERS AND FOREIGN CORPORATIONS CAN CLAIM NO GREATER RIGHT THAN IS ACCORDED DOMESTIC CORPORATIONS

In the case of *Ozan Lumber Co.* v. *Biddie*, (Nov. 2, 1908) 87 Ark. 587, the Supreme Court of Arkansas held this statute valid as to domestic corporations, as a valid exercise of the right reserved by Article 12, section 6 of the Constitution of the State to alter corporate charters.

This decision was entirely in harmony with the decisions of the Supreme Court of the United States.

Berea College v. *Kentucky*, (Nov. 9, 1908) 211 U. S. 45, 54, 56, and cases cited.

While as was said by Mr. Justice Brewer in the above case, "It is undoubtedly true that the reserved power to alter or amend is subject to some limitations," no case we have found suggests a limitation which would prohibit a statute such as this. On the contrary we construe the decisions as expressly approving statutes of this character as a proper exercise of the reserve power to alter charters of domestic corporations.

In the case of *Missouri Pacific* v. *Mackey*, 127 U. S. 205, the appellant a Kansas corporation sought to strike down a statute of that State, abrogating the fellow-servant rule as to railroad corporations but not as to natural persons operating railroads, nor as to other corporations or persons generally.

The first premise adopted by Mr. Justice Field in support of the decision that the law was valid, appears to be that such a statute when applied to domestic corporations in general was a valid exercise of the reserve power to alter charters, for at page 209 of the report he says:

> "The plain answer to this contention is that the liability imposed by the law of 1874 arises only for

injuries subsequently committed; it has no application to past injuries, *and it cannot be successfully contended that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business* in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every State."

Additional support for the view that the Mackey case decided that such legislation is valid when applied to all domestic corporations, is found in the fact that the learned Justice considered it necessary to go no farther than to find a distinction between railroad corporations and corporations generally. At page 210 of the report he says:

"But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to *railroad corporations* having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not similar to dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination."

In *Tullis* v. *Lake Erie & Western Ry. Co.*, 175 U. S. 348, this Court sustained a similar statute of Indiana, as applying to railroad corporations. In the briefs filed in that case it was pointed out that the statute discriminated "between railroads owned by individuals, co-partnerships or joint stock companies and those owned by corporations." The opinion of the Court does not directly deal with this question, but it seems to be assumed that such a statute if applied to all corporations but to no other employers would be valid.

It appears to us that the decision in *Ozan Lbr. Co.* v. *Biddie, supra,* is accepted by this Court as sound law in so far as it applies to domestic corporations. In *Aluminum Co.* v. *Ramsey,* 222 U. S. 251, 255, Mr. Justice McKenna says:

> "In *Ozan Lumber Co.* v. *Biddie, supra,* the court decided that 'the fellow-servant law' was an amendment to the charters of corporations, made, under the right reserved in the Constitution of the State to repeal, alter, or amend such charters. The Ozan Lumber Company, however, was a *domestic corporation, and whether the principle of the decision would be applicable to foreign corporations, as plaintiff in error in the case at bar is, being a Pennsylvania corporation, depends on many considerations, and involves questions not local.*"

The question as presented in the court below, and as here presented by appellant's assignment of error, is not that the statute is invalid as to foreign corporations, but that it is invalid as to all corporations, domestic and foreign (R. 14 and 98).

Since the limited question of the validity of this statute as affecting foreign corporations was not raised in the court below nor by the assignment of error in this court, it cannot be considered.

Rosenthal v. *New York,* 226 U. S. 260, 272.

But had the question been timely and properly presented, the fact that the statute applies equally to and is valid as to domestic corporations would be a sufficient answer, for as was said by Mr. Justice Field in the case of *Pembina, etc. Co.* v. *Pennsylvania,* 125 U. S. 181, 189:

> "The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State."

Especially should this be the rule applying to foreign corporations doing business in Arkansas, for the Constitution of this State provides that foreign corporations admitted to the State "shall be subject to the same regulations, limitations, and liabilities as like corporations of this State."

Constitution of Arkansas, Art. 12, sec. 11.

This court has frequently held that that which a State may do with corporations of its own creation, it may do with foreign corporations admitted therein.

Orient Ins. Co. v. *Daggs*, 172 U. S. 557;

New York Life Ins. Co. v. *Cravens*, 178 U. S. 389;

Prudential Ins. Co. v. *Cheek*, 259 U. S. 530;

Dayton Coal & Iron Co. v. *Barton*, 183 U. S. 23.

CONCLUSION

Not only has appellant failed to meet the burden imposed upon it to show facts entitling it to raise the question and that the statute is palpably unreasonable and arbitrary, but on the contrary the history of the fellow-servant doctrine discloses that corporations have always presented a distinct problem, constituting them a separate class, to which the courts have often applied different rules than that applied to individual masters. The classification being thus justified and long recognized it was not palpably unreasonable and arbitrary for the Legislature to carry it into this statute.

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

No. 386

In the Supreme Court of the United States

October Term, 1935.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants.*

vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

PETITION FOR REHEARING.

NEILL C. MARSH, SR.,
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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1935.

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION, *Appellants.*

vs.

R. O. JENKINS, *Appellee.*

Appeal From the Supreme Court of the State of Arkansas.

PETITION *for* REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the United States:

The appellant, Phillips Petroleum Company, respectfully petitions for a rehearing of this cause upon the following grounds:

1. The court made an unwarranted application of the reserved power of a state to amend corporate charters and declined to pass upon the question of whether or not the statute in question independently of the reserved power to amend corporate charters deprived appellant of the equal protection of the law.

(a) Appellant was admitted to do business in Arkansas *after* the enactment of the statute. If the statute

was a part of corporate charters, it became a part of appellant's authorization to do business originally and not by any power of amendment.

(b) Under the reserved power of a state to amend corporate charters, it retains power only over that which it grants. The purpose of the reserved power is to prevent the charter from operating as a binding contract which cannot be altered or revoked under the provisions of section 10 of article 1 of the Federal Constitution. No contractual rights are claimed by appellant; its only claim is to the equal protection of the law conferred upon it by the Federal Constitution. Not having conferred upon appellant the right to the equal protection of the law by admitting it to do business in the state, the discrimination between corporations and natural persons cannot be justified under the reserved power of the state to amend corporate charters.

2. The court erroneously held that, by the passage of the act in question, the general assembly will be presumed to have determined that conditions in Arkansas warranted the abolition of the fellow-servant rule as to corporations and not as to natural persons. Before the court can properly assume the existence of conditions to justify the discrimination, it must determine what conditions, if found to exist, would sustain the classification; this the court, contrary to custom, has not done. Nor has the general assembly or the State Supreme Court pointed out any conditions existing in the state which would justify the classification. The question for the court, therefore, is whether the mere character of the employer as to being incorporated or unincorporated warrants a different rule of liability.

In specification of the foregoing, the court's attention is respectfully called to the following comment:

I.

We accept the court's determination that a foreign corporation can claim no greater rights in a state than a domestic corporation, and we have no objection to the court's following the State Supreme Court's determination that the provision of section 7137 is a part of the charters of corporations organized in Arkansas since its enactment and that through the power to alter or amend it is included in the charters of corporations earlier organized under the laws of that state. We accept and invoke the rule announced by this court that:

> "Arkansas might have refrained from enactment of statutes creating or authorizing organization of corporations and might have denied to foreign corporations admission to the state. *But it may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution. If section 7137 is repugnant to the equal protection clause, it is without force as a part of the charter contract or otherwise.*"

In view of that language it is difficult to understand why the court based its opinion upon the reserved power of the state to amend charters of corporations and said that it was unnecessary to decide the question whether, independently of the reserved power to amend charters and of the bases for legislative action upon which the state constitution conditions alterations, the provisions of section 7137 may be sustained as not repugnant to the equal protection clause.

In any event, the court made a misapplication of the power reserved in the state to amend charters of corporations. It was stated by counsel for appellant at the argument, in answer to a question by Mr. Justice CARDOZA, that appellant was admitted to do business in Arkansas *after* the enactment of the statute. The power to amend corporate charters is therefore not involved, for an amendment may be made only to something that has gone before. And, of course, the power to amend is no greater than the power to prescribe in the first instance. So, for the purposes of this case, the statute should be considered as an independent enactment of law or as an enactment of law written into the authorization of appellant to do business in the state—the legal effect is the same.

Notwithstanding the above, the court has grounded its decision upon the reserved power of the state to amend corporate charters, following a process of reasoning which seems to recognize extra power in the state by reason of its own constitutional provisions and statutory enactments. How the state can confer upon itself extra power to legislate with respect to the rights of persons protected by the Federal Constitution is not apparent. In any event, the power to amend corporate charters is irrelevant to this case for a reason additional to the one above suggested, which will be stated.

The purpose of the power reserved by state constitutions to amend corporate charters is that the charter may not constitute a binding contract which the legislature cannot alter or revoke, in view of section 10 of article 1 of the Federal Constitution. It was the decision of this court in the *Dartmouth College Case*, and the suggestion of Mr. Jus-

tice STORY, in his concurring opinion, which prompted the states to provide for the amendment of corporate charters. 4 Wheat. 518, 712, 4 L. ed. 629, 677.

Appellant has never claimed any contractual right with the State of Arkansas which section 7137 would impair, and therefore the court's reference to section 10 of article 1 of the Federal Constitution is wholly irrelevant. Unlike the case of *Texas & N. O. R. R. Co.* v. *Miller,* 221 U. S. 408, cited by the court, no special privilege was granted by the State of Arkansas to appellant (in that case an exemption was granted the railroad company in its charter from liability for the death of any person in its service, even if caused by its negligence). The rights claimed by appellant are only those conferred upon every person by the Fourteenth Amendment to the Constitution of the United States. *The right of equal protection of the laws not having been granted by the State of Arkansas, the right cannot be taken away or affected by any reserved power to amend corporate charters.* The purpose of the reserved power of a state to amend corporate charters and the extent of that power are ably stated by Mr. Justice FIELD, sitting as Circuit Judge in *The Railroad Tax Cases,* 13 Fed. 723, 754. In that case a state statute provided that a mortgage, deed of trust, contract, or other obligation by which a debt is secured should be deducted from the value of the property in making an assessment for taxation, except as to railroad and other *quasi* public corporations. It was sought to justify the discrimination under the reserved power of the state to amend corporate charters. In answering that contention, Mr. Justice FIELD said:

"The state grants to railroad corporations formed

under its laws a franchise, and over it retains control, and may withdraw or modify it. *By the reservation clause it retains power only over that which it grants;* it does not grant the rails on the road; it does not grant the depots along-side of it; it does not grant the cars on the track, nor the engines which move them, and over them it can exercise no power except such as may be exercised through its control over the franchise, and such as may be exercised with reference to all property used by carriers for the public. The reservation of power over the franchise—that is, over that which is granted—makes its grant a conditional or revocable contract, whose obligation is not impaired by its revocation or change. *The Supreme Court established, in the Dartmouth College Case, that the charter of a private corporation is a contract between the corporators and the state, and that it was, therefore, within the prohibition of the federal constitution against the impairment of contracts. To avoid this result the states have generally inserted clauses in their constitutions reserving a right to repeal, alter, or amend charters granted by their legislatures, or to repeal, alter, or amend the general laws under which corporations are allowed to be formed. The reservation relates only to the contract of incorporation, which, without such reservation, would be irrepealable. It removes the impediment to legislation touching the contract. It places the corporation in the same position it would have occupied had the Supreme Court held that charters are not contracts, and that laws repealing or altering them did not impair the obligation of contracts.* The property of the corporation, acquired in the exercise of its faculties, is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business."

Speaking for this court, Mr. Justice FIELD, in *Tomlinson* v. *Jessup,* 15 Wall. 454, 21 L. ed. 204, said:

> "The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. *It is a provision intended to preserve to the state control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation.*"

To the same effect see: *The Union Pac. R. Co.* v. *United States,* 66 U. S. 700, 719, 25 L. ed. 496, 501; *Shields* v. *Ohio,* 95 U. S. 319, 324, 24 L. ed. 357; *Southern R. Co.* v. *Board of Railroad Commissioners,* 78 Fed. 236, 254 (C. C., N. D., California, opinion by Circuit Judge McKenna); *Hill* v. *Glasgow R. Co.,* 41 Fed. 610, 616 (C. C., D. Kentucky, opinion by Jackson, J., later Justice of the Supreme Court); *San Joaquin & Kings River C. & I. Co.* v. *Stanislaus County,* 113 Fed. 930, 938; *Fidelity Building & Loan Association* v. *Thompson,* 51 S. W. (2d) 578 (Tex.).

By authorizing appellant to do business in Arkansas, *the state did not grant the equal protection of the law; it did not grant freedom from liability for the negligence of an employee resulting in injury to a co-employee.* The first right was granted by the Federal Constitution and the second was granted by the common law. The power to amend corporate charters reserved to the state did not therefore embrace the power to apply one rule of liability to appellant and other corporations and an entirely different rule to individual employers similarly circumstanced. The reasoning of the court, based as it is upon the power to amend corporate charters within the provisions of the constitution of the state, is inapplicable and fallacious. The real question for the court to decide is whether or not a law, wheth-

er treated as a separate enactment or as a part of domestic corporate charters and a part of the authorization of foreign corporations to do business, which provides one rule of liability of corporations to their employees and another rule of liability of individual employers to their employees, deprives corporations of the equal protection of the law. And the solution of this question turns upon whether or not the classification is based upon a real and substantial difference having a reasonable relation to the particular legislation. This question should not be obscured by a discussion of the power of a state to amend corporate charters.

II.

We do not think, however, that the state conferred upon itself any additional powers by the provisions in its constitution for amendment of corporate charters when, in the opinion of the general assembly, the charter "may be an injustice to the citizens of this state," and then only "in such manner, however, that no injustice shall be done to the corporators." It surely cannot be said that the state does an injustice to its citizens by permitting the same rule of liability to apply to corporations and to individuals in the absence of some difference other than the mere character of the employer. And, of course, if those differences exist and if they are real and substantial and have a reasonable relation to the liability of employers to their employees, there would be a basis for classification which would sustain the statute in question as an independent enactment of law under the police powers, and resort to the power of the state to amend corporate charters would not be necessary. Stated otherwise, the state of facts which would justify an enactment of law as an amendment to corporate charters

under the state constitution would also justify a classification independently of the power reserved to amend corporate charters. Likewise, it can hardly be doubted that the provision of the state constitution "that no injustice shall be done to the corporators" would be violated by any statute which deprived the corporation of the equal protection of the law.

The court has not stated, and we know of no decisions holding, that there is any greater presumption in favor of legislation characterized as an amendment to corporate charters than legislation enacted under the police powers of the state. If the statute in question can be justified under the assumption that the state legislature found facts to exist which warranted the placing of greater burdens upon corporate employers than upon individual employers, on the theory of the reserved power in the state to amend corporate charters, then it may also be justified under the same assumption independently of the reserved power to amend corporate charters. And the converse is equally true. Under either theory, therefore, the question is whether this court will presume that there existed facts sufficient to justify the classification. In the opinion, this court said:

> "There is nothing in the record or of which judicial notice may be taken to negative the conclusions of the general assembly upon the matters specified or to show that the distinction made by the statute is a groundless and arbitrary discrimination against corporations. For aught that appears, conditions in Arkansas do not warrant belief that enforcement of the common law fellow-servant rule as to employees' claims for damages on account of personal injuries suffered by them in the service of employers other than those covered by section 7137 might be injurious to citizens

of the state or that the abrogation of the rule would not be unjust to that class of employers. And justly, we think, it may be assumed that, if in Arkansas there existed facts sufficient to constitute the specified bases for legislative action in accordance with the constitutional provision, the general assembly would have abrogated the fellow-servant rule and extended the one made by Sec. 7137 to all employers."

The thought expressed in the last sentence might as well have been applied in *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 72 L. ed. 927, where it was held that the character of the owner of property—whether a corporation or a natural person—was not a reasonable basis for classification for the purposes of a gross income tax derived from the operation of taxicabs. *Why did not the court there assume that, if in Pennsylvania there existed facts sufficient to bring individual owners of taxicabs within the just operation of a gross income tax law, the legislature would have extended the law to them?* Why, also, did not the court, in *Kentucky Finance Corp.* v. *Paramount Auto Exchange Corp.,* 262 U. S. 544, 67 L. ed. 1112, assume that there existed facts sufficient to justify a distinction between a corporate non-resident of the state and an individual non-resident of the state conducting litigation in the State of Wisconsin and that, if there had not existed facts sufficient to make the distinction, the state legislature would have placed both corporate and individual non-residents in the same class? And why did not the court make similar assumptions in *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis,* 165 U. S. 150, 41 L. ed. 666? The answer is, we think, that such an assumption would have been unreasonable, and this court makes reasonable assumptions, only, to sustain leg-

islation. We submit that, *before this court can properly presume the existence of facts upon which the classification could be justly based, it should determine what facts would justify the classification.* The legislature has not called attention to any facts peculiar to that state upon which the statute is based, nor has the Supreme Court of that state pointed out any conditions existing in the state justifying the classification *(Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 66 L. ed. 1044), *and this court has not so much as suggested what kind of facts could justify the classification.* Without determining that question, we submit that it is improper to assume the existence of the necessary facts. In the cases we have examined where the court has upheld the constitutionality of statutes by indulging the presumption that facts existed which justified the classification, the court has stated the possible facts that the legislature may reasonably be deemed to have found to exist. *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580, 79 L. ed. 1070; *Standard Oil Co.* v. *City of Marysville,* 279 U. S. 582, 73 L. ed. 856; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 76 L. ed. 214; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 75 L. ed. 324; *Ohio, ex rel. Clarke,* v. *Deckebach,* 274 U. S. 392, 71 L. ed. 1115; *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32, 72 L. ed. 770.

Classification of employers for the purposes of liability to employees has been justified only upon two grounds, so far as we have been able to find, namely, *(1)* the hazard of the business *(Missouri Pac. Ry. Co.* v. *Mackey,* 127 U. S. 206, 32 L. ed. 107), and *(2)* the number of employees *(Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 63 L. ed. 527).

Therefore, in order to uphold this legislation, it must be assumed that the legislature found that the businesses of corporations were hazardous and that the businesses of individuals were not, or that corporations employed a number of persons and that individuals did not. In view of the fact that the statute of Arkansas (section 1700, Crawford & Moses' Digest) provides for the formation of a corporation to conduct *any lawful business,* and that no minimum or maximum is provided for the amount of capital stock (section 1701, Crawford & Moses' Digest), it would seem that a presumption that corporations generally are engaged in hazardous businesses or that they employ a number of people would be unwarranted; but, even if that should be assumed, it is not enough. It must further be assumed that natural persons are not engaged in hazardous businesses or do not employ a number of people. *The court must know what is generally known, and that is that there are small corporations and large ones, and there are large and small individual employers; that corporations are engaged in all kinds of businesses, both hazardous and non-hazardous, as are individuals. The conclusion must be that there can be no state of facts which the legislature could have found to justify the discrimination here complained of.*

If the court should continue to treat the legislation in question as having a special and preferred character on account of its characterization by the Supreme Court of Arkansas as an amendment of corporate charters, nevertheless it would seem that in the determination of whether or not the legislation violates constitutional principles the rule with respect to presumptions to sustain the legislation should be no different than that applied to legislation

independently of the amendment of corporate charters—in other words, legislation based upon the police powers of the state. No longer ago than December 16, 1935, this court, speaking through Mr. Justice SUTHERLAND, in the case of *Coalgate* v. *Harvey*, 80 L. ed. Advance Opinions, page 225, in passing upon the validity of an income tax statute exempting money loaned within the state at a rate of interest not greater than 5%, said:

> *"If there be circumstances which will justify the exemption of any income derived from money loaned within the state while taxing the income from that loaned outside, it is for the state legislature to point them out and limit the exemption accordingly. To import any such circumstances into the present situation is to indulge in pure speculation."*

If it was "pure speculation" to presume the *stated* condition that money loaned within the state would be retained and invested in the state, how much greater speculation it is to indulge the presumption that *unnamed* and *undetermined* conditions existed in Arkansas which would warrant the discrimination!

The language of this court, in *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, is apposite:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some *undisclosed and unknown* reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

The court apparently minimizes the seriousness and importance of the right of which the statute deprives appellant. The court says: "It [the statute] *merely* substitutes the rule of *respondeat superior* for the common law fellow-servant rule," which, stated otherwise, *might be,* "It *merely* creates a liability which did not exist before." It is readily seen that the word "merely" is scarcely appropriate in that sense. Freedom from liability under the circumstances in this case is a valuable right. It cannot be denied that to take from appellant that exemption while leaving in force the common law rule as to natural persons under the same circumstances deprives appellant of the equal protection of the law, and that the right of which it has been deprived is substantial. The fact, if it is a fact, that it may not be unreasonable or arbitrary to abolish the common law fellow-servant rule and to substitute the rule of *respondeat superior, if equally applied,* in no sense justifies the abolition of the rule as to corporations and not as to natural persons unless there is some real and substantial difference between a corporation and a natural person bearing a reasonable relation to liability to their employees. In other words, it is not necessary that the legislation be so arbitrary as to constitute a deprivation of property without due process of law in order to have the protection of the equal protection clause. This is demonstrated by many decisions of this court, such, for instance, as *Concordia Fire Ins. Co.* v. *Illinois,* 292 U. S. 535, 78 L. ed. 1411, where it was held that a tax on the net receipts of a foreign corporation based on an assessment at their full value when other personal property in the state was assessed at less than its full value violates the equal protection clause. To the same effect see *Hanover Fire Ins. Co.* v. *Carr,* 272 U. S. 494,

71 L. ed. 374. In those cases the corporations were required to pay taxes only on the full value of their property. Ordinarily no one could complain of that, but the complaints in those cases were sustained by this court solely on the ground of discrimination.

Respectfully submitted,

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NEILL C. MARSH, JR.,
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Attorneys for Appellants.

I hereby certify that, in my opinion, the foregoing petition is well founded and that it is not made for the purpose of delay.

RAYBURN L. FOSTER,
Of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 386.—October Term, 1935.

Phillips Petroleum Company, a Corporation, and United States Fidelity & Guaranty Company, Appellants, *vs.* R. O. Jenkins. } Appeal from the Supreme Court of the State of Arkansas.

[March 30, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

Appellee sued the Phillips Petroleum Company and J. H. Myers in an Arkansas court to recover damages for injuries suffered by him while working for that company. There was a trial by jury. It gave plaintiff a verdict in accordance with which the court entered judgment against both defendants for $50,000. On appeal to the state supreme court, the guaranty company became surety on a supersedeas bond. That court reduced the judgment to $30,000 and held plaintiff entitled to recover that amount from the petroleum company and the surety.

The petroleum company is a Delaware corporation authorized to do business in Arkansas and engaged in that State in the production and transportation of oil. Crawford and Moses' Digest of the Arkansas Statutes, § 7137, enacted March 8, 1907, declares that all corporations shall be liable for injuries sustained by any employee resulting from negligence of any other employee.[1] The Arkansas Constitution, Art. XII, § 6, provides: "Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious

[1] "Hereafter all railroad companies operating within this State, whether incorporated or not, and all corporations of every kind and character, and every company whether incorporated or not, engaged in the mining of coal, who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the careless omission of duty or negligence of such employer, or which may result from the carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer."

to the citizens of this State, in such manner, however, that no injustice shall be done to the corporators". As to domestic corporations the supreme court has repeatedly held § 7137 to be a reasonable exertion of the State's power to prescribe the terms of charters of corporations organized under its laws.[2] The state constitution authorizes admission of foreign corporations to do business in the State and declares that, as to contracts made or business there done they shall be subject to the same regulations and liabilities as like corporations of that State. Art. XII, § 11. In this case the state court, in harmony with earlier decisions,[3] held that § 7137 applies to a foreign corporation carrying on business in Arkansas.

The substance of the cause of action alleged is this: April 5, 1934, plaintiff and Myers were fellow servants in the service of the petroleum company. They and other employees were engaged in laying pipe. Plaintiff was injured while he and Myers were carrying a length of pipe. Plaintiff, his back toward Myers, had the forward end upon his shoulder; Myers had the other end and, while shifting the pipe from one shoulder to the other, negligently jerked it and threw plaintiff to the ground and injured him. The court charged that, if plaintiff's injuries were caused by the negligence of Myers, the verdict should be for plaintiff against both defendants. That instruction was in accordance with § 7137 and the verdict and judgment depend upon it. The sole question is whether by that section the State denies to the petroleum company the equal protection of the laws in violation of the Fourteentth Amendment.

Appellant does not suggest discrimination between foreign and domestic corporations or between it and any other corporation. The section by its terms extends to all corporations whether organized in Arkansas or elsewhere. Undoubtedly the power of the State to prescribe the rule of liability as one of the conditions for the admission of foreign corporations is not less than its power to include the rule in the charters of domestic corporations. Appellant's position is the same as, in like circumstances, would be that of an Arkansas corporation. Its complaint is that the State makes corporations liable for personal injuries sustained by an employee

[2] Ozan Lumber Co. *v.* Biddie, 87 Ark. 587. Soard *v.* Western Anthracite C. & M. Co., 92 Ark. 502. Missouri & N. A. Rd. Co. *v.* Vanzant, 100 Ark. 462, 466-467. See Graham *v.* Thrall, 95 Ark. 560, 563.

[3] Aluminum Co. *v.* Ramsey, 89 Ark. 522, 535; affirmed 222 U. S. 251. Mo. Valley Bridge & Iron Co. *v.* Malone, 153 Ark. 454, 461. Postal Telegraph-Cable Co. *v.* White, 190 Ark. 365, 368.

through negligence of any other employee while as to individual employers it leaves in force the common law rule that every servant assumes the risk of injuries through the negligence of his fellow servants.

We shall first consider whether consistently with the equal protection clause the State, by exertion of its power to specify provisions of charters of corporations organized under its laws and to impose conditions for the admission of foreign corporations, may prescribe the challenged rule of liability. If, by specifying the terms upon which corporations may be organized under its laws or by the exertion of the reserved power to amend corporate charters, the State may impose the challenged rule upon domestic corporations, then the petroleum company is subject to the same rule. Arkansas Constitution, Art. XII, § 11. And, as unquestionably power to prescribe the terms of corporate charters is at least as great as that reserved to change them, the validity of the provision of § 7137 here in question may be tested as if, by the use of reserved power to amend, it was added to the charter of an Arkansas corporation.

Arkansas might have refrained from enactment of statutes creating or authorizing organization of corporations and might have denied to foreign corporations admission to the State. But it may not enforce any part of the charter of a domestic corporation or any provision of its laws relating to admission of a foreign corporation that is repugnant to the Federal Constitution.[4] If § 7137 is repugnant to the equal protection clause, it is without force as a part of the charter contract or otherwise.

The reservation of power to amend is a part of the contract between the State and the corporation and therefore § 10 of Art. I of the Federal Constitution does not apply. The reserved power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations that are in-

[4] Western Union Tel. Co. *v.* Kansas, 216 U. S. 1, 27, 33. Ludwig *v.* West. Un. Tel. Co., 216 U. S. 146. Looney *v.* Crane Co., 245 U. S. 178, 188. Terral *v.* Burke Constr. Co., 257 U. S. 529. Fidelity & Deposit Co. *v.* Tafoya, 270 U. S. 426, 434. Hanover Ins. Co. *v.* Harding, 272 U. S. 494, 507, *et seq.* Power Co. *v.* Saunders, 274 U. S. 490. Quaker City Cab Co. *v.* Penna., 277 U. S. 389, 400-401. Washington *v.* Superior Court, 289 U. S. 361. Cf. Sioux Remedy Co. *v.* Cope, 235 U. S. 197, 203. Western Union Tel Co. *v.* Foster, 247 U. S. 105, 114. Frost Trucking Co. *v.* R. R. Comm., 271 U. S. 583, 593, *et seq.* Foster Packing Co. *v.* Haydel, 278 U. S. 1, 13. United States *v.* Chicago, etc., R. Co., 282 U. S. 311, 328.

consistent with the scope and object of the charter or to destroy or impair any vested property right.[5] On the other hand, it extends to any alteration or amendment "which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."[6] As the State may not surrender or bind itself not to exert its police power to guard the safety of workers, the common law fellow-servant rule may be abrogated by statute even when included in the charter of a corporation.[7] But we accept the State's determination that the provision of § 7137 here involved is a part of the charters of corporations organized in Arkansas since its enactment and that, through the power to alter or amend, it is included in the charters of corporations earlier organized under the laws of that State.

Essential to a just consideration of appellant's contention is a definite understanding of what is denied to it by the construction put upon § 7137 by the state supreme court. It was, as described by that court in an earlier case, "the common-law rule that a servant assumes the risk of negligence of his fellow servant".[8] That assumption, like the assumption of other risks incident to the employee's work, is an implied one and constitutes a part of the contract of employment. The section as construed below operates merely to negative the implication, to eliminate that term of the contract and, in its stead, to insert in charters of corporations the rule that they shall be liable for injuries suffered by an employee through negligence of another employee. It merely substitutes the

[5] Tomlinson *v.* Jessup, 15 Wall. 454, 459. Miller *v.* The State, 15 Wall. 478, 488, 493 *et seq.* Shields *v.* Ohio, 95 U. S. 319, 324. Beer Co. *v.* Massachusetts, 97 U. S. 25, 33. Sinking-Fund Cases, 99 U. S. 700, 720. Greenwood *v.* Freight Co., 105 U. S. 13, 17 *et seq.* Close *v.* Glenwood Cemetery, 107 U. S. 466, 474-476. Lake Shore &c. Railway Co. *v.* Smith, 173 U. S. 684, 698. Fair Haven R. R. Co. *v.* New Haven, 203 U. S. 379, 388 *et seq.* Berea College *v.* Kentucky, 211 U. S. 45, 57. Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, 345, 346. Mo. Pac. Ry. Co. *v.* Kansas, 216 U. S. 262, 274. Chi., Mil. & St. P. R. R. Co. *v.* Wisconsin, 238 U. S. 491, 501. Sears *v.* City of Akron, 246 U. S. 242, 248. Coombes *v.* Getz, 285 U. S. 434, 441. Pub. Serv. Com. of Puerto Rico *v.* Havemeyer, 296 U. S. —, —.

[6] Looker *v.* Maynard, 179 U. S. 46, 52.

[7] Texas & N. O. R. R. Co. *v.* Miller, 221 U. S. 408, 414.

[8] Aluminum Co. *v.* Ramsey, 89 Ark. 522, 535.

rule of respondeat superior for the common law fellow-servant rule.[9]

The power reserved by the state constitution to the general assembly "to alter, revoke or annul" any charter of incorporation is not a general authorization. Amendment may only be made whenever in the opinion of the general assembly the charter "may be injurious to the citizens of this State" and then only "in such manner, however, that no injustice shall be done to the corporators". The enactment of § 7137 necessarily implies legislative determinations in accordance with these requirements. There is nothing in the record or of which judicial notice may be taken to negative the conclusions of the general assembly upon the matters specified or to show that the distinction made by the statute is a groundless and arbitrary discrimination against corporations. For aught that appears, conditions in Arkansas do not warrant belief that enforcement of the common law fellow-servant rule as to employees' claims for damages on account of personal injuries suffered by them in the service of employers other than those covered by § 7137 might be injurious to citizens of the State or that the abrogation of the rule would not be unjust to that class of employers. And justly, we think, it may be assumed that, if in Arkansas there existed facts sufficient to constitute the specified bases for legislative action in accordance with the constitutional provision, the general assembly would have abrogated the fellow-servant rule and extended the one made by § 7137 to all employers. It is therefore plain that the legislative determinations required by the constitution and presumably made by the general assembly adequately support the challenged classification and that as construed by the state supreme court in this case the statute is not repugnant to the equal protection clause of the Fourteenth Amendment.[10]

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[9] Railroad Company *v.* Fort, 17 Wall. 553, 559. Hough *v.* Railway Co., 100 U. S. 213, 217. Randall *v.* Baltimore & Ohio R. R. Co., 109 U. S. 478, 483. Armour *v.* Hahn, 111 U. S. 313, 318. Chicago & Milwaukee Railroad *v.* Ross, 112 U. S. 377, 382 *et seq.* Northern Pacific R. R. Co. *v.* Herbert, 116 U. S. 642, 647. New York Central R. R. Co. *v.* White, 243 U. S. 188, 198-199. Cf. The Standard Oil Co. *v.* Anderson, 212 U. S. 215, 220.

[10] Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 78-79. Rast *v.* Van Deman & Lewis, 240 U. S. 342, 357. O'Gorman & Young *v.* Hartford Ins. Co., 282 U. S. 251, 257. Concordia Ins. Co. *v.* Illinois, 292 U. S. 535, 547. Cf. Quaker City Cab Co. *v.* Penna., 277 U. S. 389, 399.

We need not decide the question whether, independently of the reserved power to amend charters and of the bases for legislative action upon which the state constitution conditions alterations, the provisions of § 7137 under consideration may be sustained as not repugnant to the equal protection clause.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.